89-1972

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

IN THE MATTER OF

JAMES B. DANIELS, an Attorney-at-Law of the State of New Jersey,

Petitioner,

—v.—

SUPERIOR COURT OF THE STATE OF NEW JERSEY,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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APPENDIX

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IN THE MATTER OF JAMES B. DANIELS,
AN ATTORNEY-AT-LAW
OF THE STATE OF NEW JERSEY,
DEFENDANT-APPELLANT.

Argued May 3, 1988-Decided February 28, 1990.

Louis Raveson argued the cause for appellant, James B. Daniels.

Richard W. Berg, Deputy Att. Gen., argued the cause for respondent, Superior Court of New Jersey (Cary Edwards, Att. Gen., attorney).

Susan J. Abraham, Asst. Deputy Public Defender, argued the cause for amicus curiae, Office of the Public Defender (Alfred A. Slocum, Public Defender, attorney).

Eric Neisser, Legal Director, submitted a letter brief on behalf of amicus curiae,

American Civ. Liberties Union of New Jersey (Edward Martone, Executive Director, attorney).

Morton Stavis submitted a brief on behalf of amicus curiae, Center for Constitutional Rights.

David A. Ruhnke submitted a brief on behalf of amicus curiae, Ass'n of Crim. Defense Lawyers of New Jersey (Ruhnke & Barrett, attorneys).

Alan I. Zegas submitted a brief on behalf of amicus curiae, New Jersey State Bar Ass'n.

Carl D. Poplar submitted a brief on behalf of amicus curiae, Trial Attys. of New Jersey (Poplar & Florio, attorneys).

PER CURIAM.

Justice Felix Frankfurter wrote, dissenting in Sacher v. United States, 343

U.S. 1, 72 S.Ct. 451, 96 L.Ed. 717 (1952):

> In administering the criminal law, judges wield the most awesome surgical instruments of society. A criminal trial, it has been well said, should have the atmosphere of the operating room. The presiding judge determines the atmosphere. He is not an umpire who enforces the rule of a game, or merely a moderator between contestants. If he is adequate to his functions, the moral authority which he radiates will impose the indispensable standards of dignity and austerity upon all those who participate in a criminal trial. [Id. at 37-38, 72 S.Ct. at 468-469, 96 L.Ed. at 738].

This case tests the measure of the discharge of that responsibility by a

trial judge. Specifically, the question is whether a judge may summarily punish for contempt an attorney who mockingly laughed at the court's rulings in an open proceeding.

Authors Norman Dorsen and Leon Friedman quote Justice Frankfurter when noting that the conduct of a modern criminal trial demands of a judge three distinct leadership qualities. N. Dorsen & L. Friedman, Disorder in the Court: Report of the Association of the Bar of the City of New York, Special Committee on Courtroom Conduct 192-93 (1973) [hereinafter Dorsen & Friedman]. Foremost, "a judge is, in the first place, a judge." Id. at 192. He or she is the reflective passive minister of justice neutrally resolving the questions of law and procedure involved in the matter. The

judge is next a "traffic policeman," required to keep the extraordinary sustained flow of criminal trials moving with all deliberate speed. Id. at 193. Third, the judge is the exemplar of justice. "He personifies the abstract elements of the legal process--the need for fairness, understanding, and evenhanded application of the law." Ibid.

This role is a demanding one for any trial judge, and it is not trite to observe that what distinguishes our legal system from all others is our unflinching insistence on the dignity of the American courtroom as the ultimate repository of our liberties. Hence, we are satisfied that the judge's nondelegable duty to "impose the indispensable standards of dignity and austerity upon all those who participate in a criminal trial," Sacher

v. United States, supra, 343 U.S. at 38, 72 S.Ct. at 469, 96 L.Ed. at 738, justifies the court's summary imposition of contempt on the attorney whose conduct threatened the dignity of that proceeding. We find, however, that although the attorney's conduct warranted censure, the procedures were not consonant with the imposition of loss of liberty. We hold that the Appellate Division correctly vacated the jail sentence.

I

The facts of this case are not particularly unusual. They disclose the kind of incident that might occur any day in a courtroom. For purposes of this appeal, we will accept the version of the facts set forth in attorney's briefs.

James B. Daniels, an attorney with the Office of the Public Defender in the

Union County region, represented a client in a criminal trial that began on March 18, 1986. During pretrial hearings, there was "long and passionate argument" over the admissibility of the results of certain polygraph (lie-detector) tests. Mr. Daniels moved to exclude the results of the State's lie-detector tests, or in the alternative to rebut the State's tests with expert testimony and/or the defendant's own lie-detector test results. The attorney had previously stipulated to the admissibility of the State's polygraph test and the inadmissibility of the defense test.[1] The court enforced the

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1 The attorney's brief recites that earlier, the client had taken a lie-detector test administered by a defense expert that demonstrated the client's innocence. Although Mr. Daniels sought to

stipulation.

have the State dismiss charges on the basis of that test, the State would agree to do so only if the results of the prosecution's polygraph test concurred. As a condition of that agreement, however, the State also demanded a stipulation to the admissibility of its test results should they prove inculpatory. That stipulation, which Mr. Daniels excecuted, also provided that the results of the defense polygraph were inadmissible. Mr. Daniels sought to have the stipulation voided because, he said, the extremely contradictory results of the two tests clearly demonstrated the unreliability and lack of any probative value of those tests.

Mr. Daniels then moved that the court take judicial notice of certain scholarly articles so that Mr. Daniels could educate the jury on what he considered to be the crucial evidence in the case. The court denied that motion too after considerable oral argument. Defendant states that at this point "the court took exception to Mr. Daniels' response to his ruling," a reaction that the judge characterized as Mr. Daniels "sitting there shaking [his] head, smiling and being disrespectful." The judge warned Mr. Daniels that further display of disapproval with the court's rulings would result in incarceration. The attorney responded orally to the judge's admonitions, but the record does not include any reference by the stenographer that Mr. Daniels rolled his

eyes or laughed aloud or employed a sarcastic tone in response to the court. Nor did the contemporaneous description of the event by the court indicate that Mr. Daniels did more than smile and shake his head in response to the original ruling.

Immediately following a short recess, the attorney apologized to the court, explaining that his reaction, shaking his head, was a "very human response" and assuring the court that he had intended no disrespect. The judge responded, "Put it behind us and forget about it." The remainder of the day was uneventful.

The second day of the pretrial proceedings opened with arguments on the admissibility of the victim's identification. Again the court ruled against the defendant. Following that

ruling, Mr. Daniels sought permission to call a psychologist as an expert to testify to the underlying lack of reliability in the lie-detector test. The judge stated that he wished to think about the request, but that his initial response was negative. Most of the day was spent picking the jury.

Following jury selection but before the jury was sworn, and out of its presence, defense counsel moved for a mistrial. He relied on State v. Gilmore, 199 N.J.Super. 389, 489 A.2d 1175 (App.Div.1985), aff'd, 103 N.J. 508, 511 A.2d 1150 (1986), alleging that the prosecutor had used his preemptory challenges systematically to exclude black women from the jury. Defendant emphasizes that in the course of denying the Gilmore

motion, the judge suggested that the motion was untimely despite the fact that it was made before the jury was sworn. The judge abruptly interrupted his ruling to criticize Mr. Daniels' reaction to the court's ruling, stating, "Put on the record right now, you laughed, you rolled your head, you threw yourself back on your seat." As with the incident the day before, the judge's reaction was prompted by Mr. Daniels' physical reaction to the judge's ruling, not by any statement the attorney made.

Mr. Daniels immediately protested that the judge's characterization was not accurate. Defendant asserts that "[b]efore giving Mr. Daniels an opportunity to be heard as to either guilt or punishment [the court] found Mr.

Daniels in contempt and released the jury, thereby terminating the proceeding." The court said: "I find you in contempt of court. You'll be able to respond right now. I declare that this jury will be released."

At that point the court discharged the jury. The court referred to the opinion of State v. Vasky, 203 N.J.Super. 91, 495 A.2d 1347 (App.Div.1985) (detailing contempt powers), and then declared: "I find you in contempt. You may be heard before I pass sentence." Mr. Daniels stressed that his actions were only a "human" reaction to his disappointment with the court's rulings and that he intended no disrespect, and denied again the judge's characterization of his conduct. He said, "I did nothing

other than sit back in my chair, put by head down and cover my eyes when the Court ruled [against the Gilmore application]." He immediately objected further to the court's Gilmore ruling, and the judge responded, "Don't raise your voice." Defendant asserts that other persons present in the courtroom, including the court reporter and the judge's court clerk, later attested that as far as they were able to observe, Mr. Daniels did not throw himself back in his chair, laugh, or utter any sound prior to being held in contempt, nor did he sound sarcastic or disrespectful. However, we must deal with the record as we have it. The record discloses that Mr. Daniels was asked if he wished to call any witnesses. He declined. Mr. Daniels asked to consult

with an attorney. The court refused that request. Defendant states that he was denied the opportunity to prepare his defense. Having been denied the opportunity to speak to any prospective witnesses, he says that there was no other evidence that he could have offered in his defense.

Finding that Mr. Daniels had laughed at its rulings in open court, the court then found the defendant "in contempt of court," and proceeded to impose sentence. He said, "I find you in contempt of Court and I sentence you to two days in the county jail and a $500 fine, which will be carried out immediately."

Defendant obtained a stay of imprisonment and of the fine. On March 24, 1986, five days later, the trial court

issued a supplemental order of contempt. That order, in defendant's view, both elaborates on and conflicts with the contemporaneous record. On appeal, the Appellate Division affirmed the judgment of contempt, but it vacated the sentence of confinement. In re Daniels, 219 N.J. Super. 550, 530 A.2d 1260 (1987). In that court's view, imprisonment was not an appropriate punishment, inasmuch as harm to the judicial system was not severe and the $500 fine and rebuke in open court should have sufficient deterrent effect. Id. at 592, 530 A.2d 1260. One member dissented, finding no contempt as a matter of law, and suggesting an evidentiary hearing in another trial court. Id. at 592-93, 530 A.2d 1260 (Skillman, J.A.D., dissenting). Here, he emphasized, the

contemptuous conduct, consisting of facial expressions and gestures, was not "unambiguously set forth on the trial record." Id. at 598, 530 A.2d 1260. We granted defendant's appeal as of right under Rule 2:2-1(a)(2), and his petition for certification, 109 N.J. 496, 537 A.2d 1287 (1987).

II

A.

There can be no doubt of the existence of the summary power of contempt. We may draw on the useful expression of the doctrine found in Justice Handler's concurring opinion in In re Yengo, 84 N.J. 111, 130, 417 A.2d 533 (1980), cert. denied, 449 U.S. 1124, 101 S.Ct. 941, 67 L.Ed.2d 110 (1981).

[T]his case involves the

inherent contempt power of the judiciary to challenge and punish affronts to its authority. It has long been recognized that there are occasions when this inherent authority must be exercised both swiftly and summarily in order to ensure obedience to court orders and respect for court procedures. See In re Oliver, 333 U.S. 257, 274, 68 S.Ct. 499, 508, 92 L.Ed. 682, 695 (1948); Cooke v. United States, 267 U.S. 517, 534, 45 S.Ct. 390, 394, 69 L.Ed. 767, 773 (1925); Ex parte Terry, 128 U.S. 289, 302-303, 9 S.Ct. 77, 79, 32 L.Ed. 405, 408 (1888). The summary contempt

power is integrally related to judicial self-preservation. State v. Zarafu, 35 N.J.Super. 177, 182 [113 A.2d 696] (App.Div.1955). "The sole credible basis for the summary contempt process is necessity, a need that the assigned role of the judiciary not be frustrated." In re Fair Lawn Education Ass'n, 63 N.J. 112, 114-115 [305 A.2d 72], (1973), cert. den., 414 U.S. 855, 94 S.Ct. 155, 38 L.Ed.2d 104 (1973); McAlister v. McAlister, 95 N.J.Super. 426, 440 [231 A.2d 394] (App.Div.1967). This judicial "power is as ancient as the courts to which it is

> attached and 'as ancient as any other part of the common law.'" In re Caruba, 139 N.J.Eq. 404, 427 [51 A.2d 446] (Ch. 1947), aff'd 140 N.J.Eq. 563 [55 A.2d 289] (E. & A.1947), cert. den. 335 U.S. 846, 69 S.Ct. 69, 93 L.Ed. 396 (1948) (quoting Rex v. Almon, 97 Eng.Rep. 94, 99 (K.B.1765)). (footnote omitted).

The New Jersey Code of Criminal Justice, while abolishing common-law crimes, preserves this judicial power to punish for contempt. N.J.S.A. 2C:1-5(c). The power is further defined by statute, N.J.S.A. 2A:10-1 to -8, and in our Rules of court. Rule 1:10-1 provides, "Contempt in the actual presence of a judge may be adjudged summarily by the judge without

notice or order to show cause." The expressions "adjudged summarily" and "criminal contempt power" are familiar to judges and lawyers but may not be equally familiar to all others. Thus we explain. The phrase "contempt power" really means the power to punish, and in our society that means the power to fine or imprison one who has violated judicial authority. There are two strands to the contempt doctrine that are sometimes not easily separated in its fabric. One strand is "civil contempt"; the other is "criminal contempt." The labels that jurisdictions may place on the exercise of judicial power to punish are not significant. It is the substance that determines the outcome.

Civil contempt proceedings are

primarily coercive; criminal contempt proceedings are punitive. As the court explained in Gompers [v. Buck's Stove & Range Co., 221 U.S. 418, 443, 31 S.Ct. 492, 498, 55 L.Ed. 797, 807 (1911)], "[t]he distinction between refusing to do an act commanded (remedied by imprisonment until the party performs the required act) and doing an act forbidden (punished by imprisonment for a definite term) is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment."

[Hicks v. Feiock, 485 U.S. 624, 646, 108 S.Ct. 1423, 1437, 99 L.Ed.2d 721, 741 (1988).]

Failure to pay alimony is a familiar

example of the type of act cognizable in an action for civil contempt. Id. at 646, 108 S.Ct. at 1437, 99 L.Ed.2d at 741. One important indication of which contempt strand applies is whether the judgment inures to the benefit of another party to the proceeding, i.e., is compensatory in nature, or vindicates the authority of the court, as does a fixed court fine. Id. at 646, 108 S.Ct. at 1437, 99 L.Ed.2d at 741. Another indication is the type of sentence imposed. Civil sanction requires incarceration only until compliance with a court order, whereas criminal sanction requires a fixed term. Id. at 646, 108 S.Ct. at 1437, 99 L.Ed.2d at 741.

Our current court Rules do not use the term "civil contempt"; rather, we view the process as one of relief to litigants.

R. 1:10-5. Unlike criminal contempt, which can be initiated only by the court, civil contempt allows any litigant to invoke relief in aid of a judgment or order of a court. Those are not easy lines to draw in many cases, but this case is clearly one of criminal contempt. Daniels was not being imprisoned until he complied; he did not carry the "keys to the prison" in his pocket. See Hicks v. Feiock, supra, 485 U.S. at 646, 108 S.Ct. at 1437, 99 L.Ed.2d at 741. He was sanctioned for what he did.

B.

What makes this case so important to bench and bar is the exercise of "summary contempt power." What that means is that punishment is imposed without the familiar procedures that ordinarily attend the

criminal law.

The justification for that "extraordinary power to punish without the formalities required by the Bill of Rights for the prosecution of *** crimes generally, is that the necessities of the administration of justice require such summary dealings with obstructions to it. It is a mode of vindicating the majesty of law, in its active manifestation, against obstruction and outrage." Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11, 16 (1954). But the United States Supreme Court has observed that the outer limit of the contempt power is "the least possible power adequate to the end proposed." Hicks v. Feiock, supra, 485 U.S. at 637 n.8, 108 S.Ct. at 1432 n.8, 99 L.Ed.2d at 735 n.8 (quoting

Shillitani v. United States, 384 U.S. 364, 371, 86 S.Ct. 1531, 1536, 16 L.Ed.2d 622, 628 (1966); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231, 5 L.Ed. 242, 248 (1821)).

Concurring in the Court of Appeals judgment in United States v. Sacher, 182 F.2d 416, 455 (2d Cir.1950), aff'd, 343 U.S. 1, 72 S.Ct. 451, 96 L.Ed. 717 (1952), Judge Jerome Frank observed:

> Undeniably, to punish summarily for contempt--to charge and hold a man guilty of a crime without a trial--is, and should be, an extraordinary exception in a civilized legal system; ordinarily, in this country an accused person is constitutionally entitled to a

> trial and before someone other than his accuser. But Congress and the Supreme Court have recognized one exception: The statute and the Rule (promulgated by the Supreme Court) explicitly authorize a trial judge to punish summarily--without a trial before another judge--conduct (a) which is contemptuous and (b) which the judge "saw and heard," it being "committed in the actual presence of the court." The validity of that statute or of that rule is not challenged here by anyone.

Time has not altered the significance of Judge Frank's remarks.

[1] This extraordinary power, then, should be exercised sparingly and only in the rarest of circumstances. When an attorney's conduct in the actual presence of the court has the capacity to undermine the court's authority and to interfere with or obstruct the orderly administration of justice, there can be no alternative but that a trial court assume responsibility to maintain order in the courtroom. This narrow exception to due-process requirements permits the imposition of sanctions only for "charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate

punishment is essential to prevent 'demoralization of the court's authority' before the public." In re Oliver, 333 U.S. 257, 275, 68 S.Ct. 499, 509, 92 L.Ed. 682, 695 (1948) (quoting Cooke v. United States, 267 U.S. 517, 536, 45 S.Ct. 390, 394, 69 L.Ed. 767, 773 (1925)). The classic case for instant action is Ex parte Terry, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405 (1888), in which an attorney, seeing his wife led from the courtroom by a United States Marshal, assaulted the marshal and was immediately held in contempt of court.

[2] Necessity not only justifies the summary contempt power, but also limits that power by defining both settings for its exercise and procedural safeguards. In re Fair Lawn Educ. Ass'n, 63 N.J. 112,

114-15, 305 A.2d 72 (1973). With few exceptions, every contempt calls for an explanation. In re Logan, 52 N.J. 475, 477, 246 A.2d 441 (1968). Thus, even in summary contempt proceedings against an attorney, the attorney should be informed of the charge and given an opportunity either to dispel any possible misunderstanding or to present any exculpatory facts that are not known to the court. The provision for de novo appellate review of summary contempt convictions is a fail-safe mechanism for assuring that the contempt power is not abused. In re Yengo, supra, 84 N.J. at 135, 417 A.2d 533 (Handler, J., concurring) (judicial appellate review is a "judicial failsafe against not only trial court abuse, but trial court

mistakes as well"); see N.J.S.A. 2A:10-3; R. 2:10-4 (authorizing review on facts as well as law); see, e.g., In re DeMarco, 224 N.J.Super. 105, 539 A.2d 1230 (App.Div.1988) (affirming contempt conviction after consideration de novo with independent findings).

[3] Within this narrow exception to due-process requirements, contempt in the face of the court, the guarantee of right to counsel ordinarily does not apply. In re Oliver, supra, 333 U.S. at 275, 68 S.Ct. at 509, 92 L.Ed. at 695. Defendant points out that the United States Supreme Court has ruled, based on sixth-amendment and due-process guarantees, that no one may be imprisoned for an offense if the party was denied the right to be represented by counsel at trial.

Argersinger v. Hamlin, 407 U.S. 25, 37, 92 S.Ct. 2006, 2012, 32 L.Ed.2d 530, 538 (1972). The United States Supreme Court has also established right to counsel in a juvenile-delinquency case where civil proceedings resulted in institutional commitment. In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). We do not believe, however, that the guarantee of right to counsel limits the summary contempt power. Nor does our decision in Rodriguez v. Rosenblatt, 58 N.J. 281, 295, 277 A.2d 216 (1971) (requiring counsel for indigent defendant imprisoned or subjected to "other consequence of magnitude") mandate such limitation. Contempt proceedings are traditionally characterized as "sui generis,--neither civil actions nor prosecutions for

offenses." Myers v. United States, 264 U.S. 95, 103, 44 S.Ct. 272, 273, 68 L.Ed. 577, 579 (1924). We agree with the Appellate Division that, especially where the party is an experienced trial attorney, the Argersinger due-process rationale does not require extending the right to counsel in a summary contempt proceeding. 219 N.J.Super. at 581, 530 A.2d 1260.

C.

But whereas there is inherent in the court's power to punish contempts summarily some necessary diminishment of the ordinary "procedural due process accorded to the alleged contemnor," In re Yengo, supra, 84 N.J. at 122, 417 A.2d 533, we have always stressed that due process is a "dynamic concept," Callen v.

Sherman's, Inc., 92 N.J. 114, 136, 455 A.2d 1102 (1983), and that its "sense of fairness cannot be imprisoned in a crystal." Id. at 134, 455 A.2d 1102. The United States Supreme Court has developed, and we have emulated, New Jersey State Parole Bd. v. Byrne, 93 N.J. 192, 460 A.2d 103 (1983), a sliding scale for evaluation of due-process requirements depending on the nature of the liberty interest involved and the degree of reliability required in the fact-finding process. See Morrissey v. Brewer, 408 U.S. 471, 489, 92 S.Ct. 2593, 2604, 33 L.Ed.2d 484, 499 (1972) (parole revocation requires notice of charges, opportunity to present witnesses, and a "neutral and detached" hearing body). The greater the risk of error, the more the need for procedural

safeguards.

Moreover, as the interests affected and need for reliability of fact-finding increase, the due-process rights of the party increase. Whether due process may require a particular step in the decision-making process is judged under the familiar three-part standard of Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The Mathews test considers three factors: (1) the private interest affected; (2) the risk of error and probable value of additional procedural safeguards; and (3) the government's interest. Id. at 335, 96 S.Ct. at 903, 47 L.Ed.2d at 33.

The need for reliability was heightened in this case, because the attorney's objectionable conduct was

nonverbal, and the record does not so easily lend itself to validating the judge's factual findings. In many cases the record will clearly reveal the contemptuous conduct. See, e.g., In re DeMarco, supra, 224 N.J.Super. 105, 539 A.2d 1230 (transcripts disclose the insulting and demeaning conduct on the part of the attorney). And see Judge Hand's detailed recitation of facts plainly disclosed in the trial transcripts of United States v. Sacher, supra, 182 F.2d 416.

And there are some circumstances in which judge and lawyer may become embroiled in what may appear to be a personal confrontation, thus increasing the need for reliable fact-finding. The United States Supreme Court, in the

exercise of its supervisory power over federal courts and not in the exercise of a constitutional mandate, has ruled that in such circumstances the better practice is that

> where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place. [Offutt v. United States, supra, 348 U.S. at 14-15, 75 S.Ct. at 13-14, 99 L.Ed. at 16 (quoting Cooke v. United States, 267 U.S. 517, 539, 45

S.Ct. 390, 396, 69 L.Ed. 767, 775 (1925)).]

We have allowed the qualified exercise of judicial contempt power to imprison for violation of a court order, see In re Buehrer, 50 N.J. 501, 515, 236 A.2d 592 (1967), but required that "the summary power***be hemmed in by measures consistent with its mission"--there, a hearing before another judge.

Such procedures conform generally with the American Bar Association standards on use of the contempt power. See American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Judge's Role in Dealing with Trial Disruptions (May, 1971) reprinted in Dorsen & Friedman, supra, at 343-48. Those standards allow summary

punishment beyond censure when contemptuous conduct is willful or the contemnor has been warned against it, require notice of charges and opportunity to be heard before sentence; and require referral to another judge if the presiding judge contributed to the contempt or if his objectivity could reasonably be questioned. Ibid.

To this we would add a special note of concern when we deal with imprisonment. There is a difference between money and freedom. No one can deny that the loss of liberty, next to the loss of life, is the greatest deprivation that a free citizen may suffer. In addition, imprisonment poses an extraordinary threat to the person who is imprisoned, both of violence in the prison setting, see Newark Star-

Ledger, Jan. 17, 1990, at 36, col. 1 (man placed in an overcrowded county jail for traffic violations had his neck broken by another inmate), and the unknown and unanticipated reaction of the prisoner, see Hake v. Manchester Township, 98 N.J. 302, 486 A.2d 836 (1985). And, for an officer of the court, the indignity of imprisonment may be regarded as perhaps the greatest loss.

We agree that such procedures impose some burdens of administration, but we also agree with Justice Black, dissenting in Green v. United States, 356 U.S. 165, 216, 78 S.Ct. 632, 660, 2 L.Ed.2d 672, 706 (1958), that when examined in closer detail, the argument of necessity contains another theme--that it will be "faster and cheaper***. But [at least when

imprisonment is at stake] such trifling economics as may result have not generally been thought sufficient reason for abandoning our great constitutional safeguards aimed at protecting freedom and other basic human rights of incalculable value."

III

How then do we apply these general principles to the myraid of instances in which a court may be called on to vindicate its authority and maintain order and dignity in the courtroom? The conduct may run the gamut from the obvious frontal assault on the system. Ex parte Terry, supra, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405 (lawyer who assaulted marshal); to the demeaning of the system, In re Yengo, supra, 84 N.J. 111, 417 A.2d 533 (lawyer

who cavalierly absented himself from a trial); the deception of the system, Kerr Steamship Co. v. Westhoff, 204 N.J.Super. 300, 498 A.2d 793 (Law Div. 1985), aff'd as modified, 215 N.J.Super. 301, 521 A.2d 1298 (App.Div.1987) (witness who lied blatantly before the court); the flouting of the system, In re Carton, 48 N.J. 9, 222 A.2d 92 (1966) (lawyer who disobeyed a lawful order of the court); and, finally, here, as in In re DeMarco, supra, 224 N.J.Super. 105, 539 A.2d 1230, to the degrading of the system by insult to the court.

We wish that we could write a program that would outline the procedure to be followed in each case. We must continue, however, to repose a sound measure of discretion in our judges. The degree of

procedure should in good measure accord with the judge's evaluation of the significance of the contempt on the system. Obviously, not every $25 fine on an attorney late for a calendar call is the occasion for the exercise of a full panoply of procedural rights. But the cases provide sound measure to guide the choice of procedures. For example, in In re Yengo, supra, 84 N.J. at 111, 417 A.2d 533, the court waited for an opportune time in the trial to adjudicate the contempt, once the attorney had returned to the courtroom, and did so without interruption of the trial. At the hearing, the attorney offered an explanation of his unapproved absence, but the court found it unsatisfactory and imposed a $500 fine. In In re DeMarco,

supra, 224 N.J.Super. 105, 539 A.2d 1230, the court informed the attorney after each incident that a hearing on his alleged contemptuous conduct would be held. At the hearing, held after conclusion of the trial, the attorney was represented by counsel. After hearing the attorney's explanation, the court imposed a $500 fine.

[4] Some of the steps a court should follow, then, are:

(1) It should immediately evaluate the gravity of the misconduct and decide whether it should invoke its right, power, and duty to charge or adjudicate the contempt. Conduct that falls short of contempt may be handled informally, outside the structure of Rule 1:10, some matters by a rebuke in chambers, some by

reference to other disciplinary bodies. Conduct that amounts to contempt may require immediate action under Rule 1:10.

(2) Once the court has determined that it should exercise the contempt power, it should immediately inform the party that it considers the act contemptuous and afford the party an opportunity to retreat or explain the circumstances, and thus avoid, perhaps, any need for adjudication.

(3) Depending on the degree of the contempt, the court must evaluate whether it calls for immediate adjudication lest there be "demoralization of the court's authority" before the public. Cooke v. United States, 267 U.S. 517, 536, 45 S.Ct. 390, 394, 69 L.Ed. 767, 773 (1925). An example would be a witness or lawyer who

refuses a lawful order of the court to cease interruption or to refrain from insult or invective in the course of a trial.

(4) If immediate adjudication of such conduct is called for, the court must evaluate whether the record will adequately disclose the essence of the contempt. As noted supra at 57, 570 A.2d at 419, in most instances of invective the record will adequately describe the misconduct. Other misconduct may be less graphic and call for fuller fact-finding. We need not, however, magnify what is a self-evident offense, such as an obscene gesture, into a mega-trial.

(5) If the contempt involves personal insult to the court (as opposed to other personnel in the system, as in Ex parte

Terry, supra, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405, or in In re McAlevy, 94 N.J. 201, 463 A.2d 315 (1983)), the court should consider whether there is any appearance of personal confrontation or loss of objectivity that would require reference of the matter to another judge.

(6) Finally, if the conduct appears to be such that imprisonment may be warranted and immediate action is not essential to prevent demoralization of the court's authority before the public, or to assure continuity of proceedings, as in the case of a continually disruptive spectator, both a more formal charging process and reference to another judge for adjudication and sentence would ordinarily be required in order to accord due process. The charge should particularly

inform the party of the need to present evidence in mitigation, or, as here, to call the other witnesses in the courtroom to state their accounts of the event.

[5] Applying the foregoing principles to the facts of this case leads us to agree substantially with the reasoning of the dissenting member of the Appellate Division and the result of the majority. Surely, if the underlying conduct occurred as found, the judgment of contempt was warranted. Contempt

> comprehends any act which is calculated to or tends to embarrass, hinder, impede, frustrate or obstruct the court in the administration of justice, or which is calculated to or has the effect of lessening its authority or its dignity; or which

interferes with or prejudices parties during the course of litigation, or which otherwise tends to bring the authority and administration of the law into disrepute or disregard. In short, any conduct is contemptible which bespeaks of scorn or disdain for a court or its authority. (Citations omitted).

[In re DeMarco, supra, 224 N.J.Super. at 116, 539 A.2d 1230 (quoting In re Callan, 122 N.J.Super. 479, 494, 300 A.2d 868 (Ch.Div.), aff'd, 126 N.J.Super. 103, 312 A.2d 881 (App.Div.1973), rev'd on other grounds, 66 N.J. 401, 331 A.2d 612 (1975)).]

The conduct occurred in the judge's

immediate presence, was witnessed by him, and was, if not "an open threat to the orderly procedure of the court,***a flagrant defiance of the person and presence of the judge before the public." Cooke v. United States, supra, 267 U.S. at 536, 45 S.Ct. at 394, 69 L.Ed. at 773; see also In re Stanley, 102 N.J. 244, 246-47, 507 A.2d 1168 (1986) (laughing and facial grimaces directed at judge part of contemptuous conduct).

[6] We agree with the Appellate Division that the fact that the judge used the words "I find you in contempt" before giving defendant the opportunity to speak did not abridge his right to be heard. 219 N.J.Super. at 577-78, 530 A.2d 1260. Of course, the accused is entitled to the presumption of innocence and his or her

guilt must be proven beyond a reasonable doubt. In re Buehrer, supra, 50 N.J. at 516, 236 A.2d 592. Yet the words themselves should not control where the one charged with contempt is actually permitted to respond, as Daniels was here. See Vasky, supra, 203 N.J.Super. at 100, 495 A.2d 1347. His guilt was not truly adjudged until after he had defended himself.

Defense counsel urges that "[l]awyers who lose their cool are not lawyers who intend to obstruct justice." We are satisfied that the Appellate Division adequately resolved the question of whether defendant's infraction was "knowing and willful and evidence[d] an intent to flout the authority of the Court." In re Mattera, 34 N.J. 259, 273,

168 A.2d 38 (1961). With respect to the question of intent, "the minimum standard is one of a voluntary action known by the actor to be wrongful or one that he reasonably should have been aware was wrongful." In re Dellinger, 461 F.2d 389, 400 (7th Cir.1972). Here the court had previously warned the attorney on the obstructive nature of the conduct, and we are satisfied that the conduct had the capacity to obstruct the administration of justice. To say that mocking gestures cannot obstruct the administration of justice is to ignore the essence of the judicial process of "sifting through conflicting versions of the facts to discover where the truth lies, and applying the correct legal principles to the facts as found. Under the best of

circumstances these tasks are difficult; without an orderly environment they can be rendered impossible." In re Vicenti, 92 N.J. 591, 603-04, 458 A.2d 1268 (1983).

Moreover, the threat was not remote. This is not a case in which a judge used contempt proceedings to punish for speech outside the courtroom critical of his rulings. See Craig v. Harney, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947); see also Bloom v. Illinois, 391 U.S. 194, 202-04, 88 S.Ct. 1477, 1482-84, 20 L.Ed.2d 522, 529-30 (1968) (recounting impeachment and 1831 acquittal of federal district court judge James Peck, for imprisoning and disbarring lawyer who pubished criticism of judge's opinion in case on appeal, and subsequent statutory curtailment of contempt power).

[7] We can well understand the mounting frustrations that this attorney had faced in confronting scientific evidence that he believed to be unreliable. It helps to explain his reaction but does not excuse it. Still, before imposing a punishment of imprisonment for such conduct, we must take care that the process accords with the interests involved and must assure the reliability of the fact-finding. The ancient justification for contempt, namely, the necessity to prevent "demoralization of the court's authority" before the public, Cooke v. United States, supra, 267 U.S. at 536, 45 S.Ct. at 394, 69 L.Ed. at 773, cannot realistically be effectuated by the jailing of an attorney in the midst of a criminal trial. See

Sacher v. United States, supra, 343 U.S. 1, 72 S.Ct. 451, 96 L.Ed. 717 (justifying delay in disposition of contempt proceedings until conclusion of trial). Hence, in most cases, a court may adjudge the contempt either at the end of trial, or, as in In re Yengo, supra, 84 N.J. 111, 417 A.2d 533, at an opportune recess in the trial. Although conclusion of a trial does not automatically require more than summary proceedings, it is an important factor in the choice of procedure. See United States v. Lummumba, 741 F.2d 12, 16 (2d Cir.1984). In this case the trial had been terminated. Because the proceedings involved imprisonment of the attorney, the procedures failed to afford the process due in such circumstances. No discredit is intended or due to the trial judge, who

followed prior precedent in proceeding as he did.

IV

During a particularly troublesome period of misconduct in American courtrooms, Professor Paul Freund eloquently summarized the pith of the problem:

> In thinking of the disorders that have been taking place in courtrooms over the country, and the proper way to deal with them, I keep recalling a conversation in a plane leaving London a few years ago. My neighbor on the plane introduced himself as a Latvian who had settled in England by way of South Africa. When he learned

that I was a lawyer he recounted an item in the English press a week before, telling of a defendant who, on being invited to address the court before sentencing, proceeded to utter a tirade against the judge. At the end the judge adjourned court for twenty-four hours, saying that he did not trust himself to impose sentence at that time. My companion then said, in a deeply stirred, almost reverential tone, "Where else in the world could you find such justice!"

The right blend of firmness and forbearance, of respect for the dignity of one's office and

> for the humanity of its contemnors, is as difficult to achieve as it is universally moving when it occurs.
>
> [Freund, "Contempt of Court," 1 Human Rights 4, 4 (A.B.A. Section of Individual Rights and Responsibilities, 1970).]

This is the ideal to which we aspire. It is not always easy to attain or maintain in an era of congested court calendars. Dignity and decorum are strained. But that should not occasion an insult to the court. And there is no inhibition of advocacy here. As was said by Justice Jackson, himself a great trial lawyer, courts "will not equate contempt with courage or insults with independence," Sacher v. United States, supra, 343 U.S.

at 13-14, 72 S.Ct. at 457-58, 96 L.Ed. at 726, but courts must "protect the processes of orderly trial, which is the supreme object of the lawyer's calling," id. at 14, 72 S.Ct. at 457, 96 L.Ed. at 726. Lawyers are officers of the court and ministers of justice, no less than the judge. As such they bear some of the same responsibility as a judge to conduct themselves with dignity, for the sake of maintaining the supreme importance of the court. See In re Carton, supra, 48 N.J. at 17-19, 222 A.2d 92 (citing Canon No. 1, Canons of Professional Ethics).

Our experience tells us that it will be the rarest occasion for a New Jersey court to be required to use the contempt power to impose substantial discipline on an attorney. When it comes to the

obligations of attorneys, we have made it clear that lawyers who turn a courtroom into theater will be on the outside looking in for a long time. See In re McAlevy, supra, 94 N.J. 201, 463 A.2d 315 (attorney suspended for discourteous conduct); In re Vicenti, supra, 92 N.J. 591, 458 A.2d 1268 (attorney suspended for, among other things, spoken attacks in the courtroom). A lawyer who mocks a judge's ruling violates the canons of our professions. He can be deatl with swiftly and surely.

But if a court believes that the affront to justice calls for the exercise of its contempt power, the procedures should accord with the degree of the interests involved and the need for reliable fact-finding. In most cases that

means that a court confronted with a mid-trial contempt will give immediate notice of intent to treat the conduct as contemptuous. The party may later retreat from or explain the apparent contempt. See In re Logan, supra, 52 N.J. 475, 246 A.2d 441.

Should it be necessry to adjudge the contempt when the party is exposed to a loss of liberty, the adjudication of the contempt should be made by another judge unless there is no other way to continue the trial. That adjudication can be on the basis of the record certified to that court, supplemented by any further oral or written submissions. Obviously, in such a proceeding the party charged would have a right to be represented by counsel.

Finally, in all contempt cases in

which the detachment of the court may reasonably be questioned, a hearing before another judge is desirable. See Mayberry v. Pennsyvania, 400 U.S. 455, 466, 91 S.Ct. 499, 505, 27 L.Ed.2d 532, 540 (1971) (remanding to a judge "other than the one reviled by the contemnor"). We emphasize, as did Justice Frankfurter in Offutt, supra, 348 U.S. at 14, 75 S.Ct. at 13, 99 L.Ed. at 16, that "justice must satisfy the appearance of justice."

We find in the circumstances of this case that the attorney has not suffered a consequence of magnitude by virtue of the appellate disposition. The adjudication of contempt is not an adjudication of criminal conduct on the part of the attorney. See In re Buehrer, supra, 50 N.J. at 518, 236 A.2d 592. Nor do we

believe that the record denotes a loss of detachment by the trial court sufficient to invalidate the adjudication. The court did not bang the gavel on counsel; rather, it terminated the proceedings that could no longer be conducted in an orderly fashion, and afforded defendant the right to be heard and, in essence, the right to retreat from the contempt. Defendant continued to maintin that he had done nothing to offend the dignity of the court. But the court saw and heard the conduct of defendant. Because the trial court may have anticipated the imposition of a jail term, as evidenced by the actual sentence, we would prefer that the matter have been heard by another judge. But we are satisfied that the Appellate Division adequately reviewed the record and made

independent findings of fact sufficient to sustain its sanction.

Thus far we have been spared in New Jersey, for the most part, the incivility that has begun to mark the practice of law elsewhere. See National Law Journal, Jan. 15, 1990, at 1, col. 3 (hardball, "Rambo-style" litigation tactics on the rise); New York Times, Aug. 5, 1988, at B5, col. 1 (many attorneys say litigation is war, advocating a "scorched earth" policy). These are the expressions of people who have undoubtedly never experienced the realities of which they speak, else they would not wish to import them into the practice of law. We have another vision of lawyers.

We recently had occasion to restate it.

> One does not have to inhale the self-adulatory bombast or after-dinner speeches to affirm that all the interests of man that are comprised under the constitutioal guarantees given to "life, liberty and property" are in the professional keeping of lawyers.
>
> [In re Vicenti, supra, 92 N.J. at 603, 458 A.2d 1268 (quoting Schware v. Board of Examiners, 353 U.S. 232, 247, 77 S.Ct. 752, 760, 1 L.Ed.2d 796, 806 (1957) (Frankfurter, J., concurring)).]

From a profession charged with such responsibilities, we expect always the truth-speaking and sense of honor embodied

in granite character. As applied to the conduct of lawyers, that translates into a requirement that "lawyers display a courteous and respectful attitude not only towards the court but towards opposing counsel, parties in the case, witnesses, court officers, clerks--in short, towards everyone and anyone who has anything to do with the legal process." Ibid.

The judgment of the Appellate Division is affirmed.

Chief Justice WILENTZ and Justices CLIFFORD, HANDLER, POLLOCK, O'HERN, GARIBALDI and STEIN join in this opinion.

For affirmance--7.

Opposed--None.

IN THE MATTER OF JAMES B. DANIELS,
AN ATTORNEY-AT-LAW
OF THE STATE OF NEW JERSEY,
DEFENDANT-APPELLANT.

Superior Court of New Jersey
Appellate Division

Argued March 24, 1987-Decided July 30, 1987.

Befores Judges MICHELS, O'BRIEN and SKILLMAN.

Louis S. Raveson, Assistant Public Advocate, argued the cause for appellant, James B. Daniels (Alfred A. Slocum, Public Advocate, attorney; Louis S. Raveson and

Lance D. Cassak, Assistant Deputy Public Advocate, of counsel and on the brief).

Richard W. Berg, Deputy Attorney General, argued the cause for respondent, The Superior Court of New Jersey, State of New Jersey (W. Cary Edwards, Attorney General of New Jersey, attorney; Richard W. Berg, of counsel and on the brief).

Poplar & Florio submitted a brief on behalf of amicus curiae Trial Attorneys of of New Jersey (Carl D. Poplar, of counsel and on the brief).

Ruhnke & Barrett submitted a brief on behalf of amicus curiae The Association of Criminal Defense Lawyers of New Jersey (David A. Ruhnke, of counsel and on the brief).

The opinion of the court was delivered by

MICHELS, P.J.A.D.

On March 19, 1986, following a

summary hearing, the Honorable Alfred J. Lechner, Jr. found defendant James B. Daniels, an attorney-at-law of the State of New Jersey, guilty of contempt in the presence of the court, sentenced him to two days in the Union County Jail and fined him $500. Defendant appealed.

The events giving rise to the contempt conviction occurred during defendant's representation of Michael McMahon, whose trial for first degree robbery commenced on March 18, 1986. Defendant was employed by the Union County Region of the Office of the Public Defender and assigned as trial counsel for McMahon. Although defendant was held in contempt on March 19, 1986, the second day of pretrial hearings, a review of the proceedings on both March 18 and 19, 1986 and of certain events leading up to trial

is necessary to establish the context in which the allegedly contemptuous behavior occurred.

On January 14, 1986, Investigator John Stanton, an expert polygraphist in the Public Defender's Office, administered a polygraph examination to McMahon. Stanton informed defendant that McMahon passed the test "with flying colors," and, that in the ten years in which he had been involved in polygraph testing, no one who passed so convincingly had ever failed a subsequent examination. Based upon this assessment, defendant contacted the Prosecutor's Office to see if they would be willing to allow McMahon to take their polygraph test on a stipulated basis. Initially, the State was not amenable to this request; however, after persisting for several weeks and filing a formal

motion to attempt to compel the State to give a stipulated polygraph, defendant was able to convince the State to allow McMahon to be tested. Thus, knowingly, voluntarily and, at all times represented by counsel, McMahon entered into an agreement with the State which provided, among other things, that (1) irrespective of the outcome, the results of the polygraph test to be administered by Investigator Peter Brannon, a polygraph expert employed by the State, would be admissible on behalf of either side; (2) the results of any other polygraph examination would not be admissible unless covered by a separate stipulation, and (3) although the opposing party [McMahon] could cross-examine Brannon as to his personal qualifications or the details of the test which he administered, McMahon

could not introduce another polygraphist to refute Brannon's expert testimony.

After conducting an examination, Brannon concluded that McMahon was not telling the truth when he denied his involvement in the robbery with which he was charged. Brannon and Stanton then compared the tests that each had administered to McMahon. Although reaching opposite results concerning McMahon's complicity in the crime, they had used virtually identical equipment and questions, and both tests were conducted properly. Neither polygrapher could explain the divergence in the results.

At the March 18, 1986 hearing, the trial court heard argument on the defense motion to have the State's polygraph evidence excluded or, alternatively, to permit the results of Investigator

Stanton's test to be admitted into evidence. Preliminarily, defendant requested a Rule 8 hearing so that the trial court might reconsider the reliability of polygraph results in light of the information which had become available since the Supreme Court's decision in State v. McDavitt, 62 N.J. 36 (1972). Defendant maintained that the plethora of research since McDavitt has established the unreliability of polygraph examinations. In support of his position, defendant presented certain literature and was prepared to offer the testimony of Dr. Leonard Saxe, a Boston University professor who authored a 1983 congressionally commissioned study which concluded that there was no scientific basis for the validity or use of the polygraph test. Nonetheless, the trial

court denied the defense request for a Rule 8 hearing. Because McDavitt established that "polygraph results are admissible if they are the subject of a knowing, voluntary, unequivocal and reciprocal stipulation" and in the instant case the parties had such a stipulation, the trial court concluded that a Rule 8 hearing would serve no purpose.

Defendant proceeded to argue that enforcement of certain provisions of the stipulation would be violative of due process public policy and principles of fundamental fairness. The thrust of defendant's argument was that precluding the defense from introducing the results of the first polygraph test through its own expert would serve no legitimate purpose and would conceal half the story from the jury. Given the overriding

concern with the search for truth, defendant maintained that the trial court should repudiate those provisions of the stipulation which would result in a distortion of the evidence presented to the jury. After allowing a lengthy argument by defendant and the State's response thereto, the trial court explained in detail that the stipulation met the requirements of McDavitt, constituted a knowing and intelligent waiver of McMahon's Sixth Amendment rights to present evidence and expert testimony, and would therefore be enforced in its entirety in the interests of justice.

After the trial court rendered its decision, defendant inquired whether, in cross-examining the State's polygraphist, he would "be permitted to read the stipulation in its entirety, making

reference to the fact [that] he [Brannon] was aware that another test had been conducted." The trial court denied defendant's request and specifically ordered him not to refer directly or indirectly to the other polygraph examination. Defendant's attempt to pursue the matter further precipitated the following exchange:

> THE COURT: I don't want to hear any further argument on it. I will not permit further argument on it. I gave you your chance earlier. It's over.
>
> MR. DANIELS: I have not been able to argue this point.
>
> THE COURT: I'm sorry. I asked you any other point on the stipulation. You said no. No further argument.
>
> MR. DANIELS: Judge--

THE COURT: Mr. Daniels, did you hear me?

MR. DANIELS: Yes, sir, I must insist--

THE COURT: You will not get it.

MR. DANIELS: I have not been given an opportunity to argue this.

THE COURT: You will not get this.

MR. DANIELS: I must have misunderstood the Court with reference to--

THE COURT: We've been doing this for two hours. This hearing is over.

Furthermore, the trial court denied defendant's application to stay the proceedings to allow for an interlocutory appeal of the ruling.

Later in the same proceedings, defendant argued that, by its terms, the parties' stipulation would allow him to

question the State's polygraphist about the "critics of [the] polygraph and their concerns about [the] unreliability and invalidity of the test in general." To this end, defendant presented to the trial court numerous articles on the polygraph and requested, pursuant to Evid. R. 9(2)(e), that the court take judicial notice of those articles. Due to the controversy surrounding the reliability of the polygraph, the trial court opined that the writings were not the proper subject of judicial notice. However, the trial court agreed with the prosecutor that defendant could use these articles to cross-examine the State's expert if he recognized them as treatises or authorities in the field. Defendant presented additional argument on the matter which the trial court agreed to

consider over the lunch recess. However, upon reconvening the hearing, the trial court ruled that it would not take judicial notice of the articles.

Defendant requested to be heard on that ruling, and the trial court afforded him five minutes to present his views. After defendant argued why he believed the articles on the polygraph satisfied the requirements of Evid. R. 9(2)(e), the following colloquy took place:

> THE COURT: So what? So what on all of this?
>
> MR. DANIELS: So what, Judge?
>
> THE COURT: That's exactly what I said. So what?
>
> MR. DANIELS: There couldn't be anything more important. I have been denied the opportunity to bring in my experts to talk about this.

THE COURT: No, you haven't been denied. You went into a stipulation agreeing not to do that. You weren't denied anything.

MR. DANIELS: I am denied that. Okay? The Court has ruled. I have said in spite of my stipulation I have asked to do this and the Court refused to allow me to.

THE COURT: The answer is no, unequivocally, unalterably, no. Anything else on this point.

MR. DANIELS: I just want to make sure I understand the Court's ruling.

THE COURT: Oh, stop. Don't posture with me. Anything else on this point?

MR. DANIELS: No

After the trial court reiterated that it would not take judicial notice of the

articles and that defendant could refer to them only if the State's polygrapher recognized them as treatises, the trial court and defendant addressed one another in the following manner:

> THE COURT: Mr. Daniels, I frankly don't care about your response but if you continue to do that, sir, I'm going to take appropriate action.
> MR. DANIELS: Your Honor, go right ahead, take whatever appropriate action your Honor deems necessary.
> THE COURT: For the record, Mr. Daniels, you're sitting there shaking your head, smiling, and being disrespectful. I'm telling you right now, you are close to the edge, sir. I frankly do not care what you think about my rulings. Should you manifest it outwardly in this

courtroom, I shall hold you in contempt and I shall put you in the County Jail. Thereafter I will adjourn the trial until you come out.

I am giving you fair warning. I will not put up with your antics. I do not want to hear a word from you again. When I say the argument is over you will sit down and be quiet. Do you understand me?

MR. DANIELS: You could not be clearer.

THE COURT: Be guided accordingly.

A recess ensued, after which defendant stated to the trial court:

I would just like to say that although clearly I was disappointed with the Court's ruling, I meant no disrespect to the Court. It was a very human response, I shook my head.

I apologize. I meant no disrespect. The trial court replied that they should "[p]ut it behind [them] and forget about it."

Following a Wade hearing, which was decided against McMahon, a jury was selected on March 19, 1986. After counsel for both sides had stated that the jury was satisfactory, but before the jurors were sworn, defendant moved for a mistrial based on the principles espoused in State v. Gilmore, 199 N.J. 389 (App.Div. 1985), aff'd 103 N.J. 508 (1986). In support of the motion, defendant maintained that four of the eight peremptory challenges exercised by the State were used to exclude black women. The State, however, argued that all four black women had relatives or close friends who had committed or were victims of crimes,

including murder. Therefore, the State was of the opinion that, despite their assertions to the contrary, these witnesses might have formed an opinion as to the criminal justice system. In rendering its decision, the trial court noted preliminarily that one of the four requirements under Gilmore is that there be a timely motion--one made prior to swearing the jury. Although not satisfied that this requirement had been met, the trial court began to rule upon the motion on the assumption that it was timely. However, the trial court stopped itself in mid-sentence and directed defendant to stand. The following then transpired:

MR. DANIELS: Yes, sir.

THE COURT: Put on the record right now, you laughed, you rolled your head, you threw yourself back in your

seat.

MR. DANIELS: Judge, I didn't, I did neither of those things, none of them, zero. And I'm tired of this kind of stuff.

THE COURT: I find you in contempt of court. You'll be able to respond right now. I declare that this jury will be released.

I find that in accordance with State v. Vasky, [203 N.J.Super. 91], decided June 24, 1985, Appellate number 2291-84-T5, the following: "A 'contempt' of court is a disobedience of the Court by acting in opposition to its authority, justice and dignity. It comprehends any act which is calculated to or tends to embarrass, hinder, impede, frustrate or obstruct the Court in the

administration of justice or which is calculated to or has the effect of lessening its authority or dignity; or which interferes with or prejudice[s] parties during the course of the litigation, or which tends otherwise to bring the authorities or administration of the law and [sic] into disrepute or disregard. In short, any conduct is contempt[i]ble which bespeaks off [sic] sworn or dis[d]ain for the authority of a Court or its authority in general.

"Even when a person commits contempt which directly insults the Court," in connection with such activity. [sic]

Now I will accord you an opportunity to show that you did not

possess at the time the requisite mens rea but this will be done at a summary hearing immediately.

I find that I warned you yesterday about your conduct in sitting in your seat, laughing, holding your head down and besmirching what is going on in this court. I find you in contempt.

You may be heard before I pass sentence.

I find you're laughing and smiling again.

MR. DANIELS: Judge, I am a human being. I respond. I have shown no disrespect. I cannot help but be a human being.

I have been in this courtroom now since Tuesday. Every single decision has gone against me. The Court has

stood there and in my opinion, most respectfully, has done nothing other than act as a second Prosecutor throughout these proceedings.

I have not at any time shown any disrespect to the Court. I have reacted like a human being. I was disappointed with the Court's responses, with the Court's decisions during the course of these proceedings. My response to it was not yelling and screaming, not raising my voice, not screwing up my face, not jumping up and down, not showing any disrespect to any member of this courtroom, of this staff or to your Honor.

I and [sic] a human being. I was disappointed. I sat back in my chair as I have been sitting back in my

chair and I lowered my head and I robbed [sic] my eyes. That is all that I did.

I think that if we put on anybody in this courtroom right now that they would testify that I did nothing that was disrespectful to the Court. I did nothing other than sit back in my chair, put my head down and cover my eyes when the Court ruled that the objection to this case was not--the objection in the Gilmore application was an application that was not timely made. The language could not be clearer. It must be done before the jury is sworn.

The application was made before the jury was sworn. The Court, in my view, was bending over backwards to find a way not to even hear the

motion, although the motion was timely made.

THE COURT: Don't raise your voice.

MR. DANIELS: I'm sorry. I am obviously human and angry. I'm trying to show the most respect that I can for this Court.

I did not engage in any conduct which by any stretch of the imagination can be deemed co[n]temptuous.

Your Honor and I have had disagreements. We will continue to have disagreements. That's the nature of the game. I am sorry that I don't sit here and thank the Court every time it rules against me. I am sorry that I don't sit here and thank the Court when it sends my client to prison. I don't see that as being my

job my responsibility or my function in this courtroom. My job, my function, my responsibility is to be the best advocate that I can for my client and I am going to do the damndest to try to do that.

The situations which Your Honor has made reference to have been situations--all of which have been outside the presence of the jury. I have not shown anything other than the most, utmost respect for the Court, for the system, for the entire process.

THE COURT: Do you wish to say anything further?

MR. DANIELS: No.

THE COURT: Do you wish to call any witnesses?

MR. DANIELS: May I have a few

moments, your Honor?

THE COURT: Respond now. Do you wish to call any witnesses of [sic] anybody who saw what you did?

MR. DANIELS: I would like to consult with an attorney.

THE COURT: Summary hearing right now. Do you want to call a witness?

MR. DANIELS: No.

THE COURT: All right. I find that you sat there and laughed. I find that response in the best light is disingenuous. I saw you sit back there and laugh.

I didn't even get a chance to put my full opinion on the record. I told you there were four criteria under Gilmore. I indicated to you that I didn't think it was a timely objection but even assuming that it

were, and giving you the benefit of the doubt, I was trying to go on to B, C and D. You interrupted by your contemptuous conduct.

I find you in contempt of Court and I sentence you to two days in the County Jail and a $500 fine, which will be carried out immediately.

I will discharge the jury before we have this carried out.

Thereupon, the trial court discharged the jury and ordered that defendant be taken to the county jail.

Because the order of contempt presented for the trial court's signature on March 19, 1986 did not contain all the information required by R. 1:10-1, and, at that time, there was no secretarial assistance available to make decisions to the order, Judge Lechner entered a

supplemental order on March 24, 1986. This order described defendant's conduct on March 18, 1986 as "expressions of disrespect," including "shaking his head, laughing, and rolling his eyes and head to express his disapproval and scorn." Moreover, the order provided that when asked if he understood the trial court's warning that a repetition of such conduct would lead to a citation for contempt and his being incarcerated, defendant "sarcastically responded that '[y]ou [the court] could not be clearer.'" Judge Lechner further stated in the order that defendant's disrespect was also manifest in his reply--"'[y]our Honor, go right ahead, take whatever appropriate actions your Honor deems necessary.'"--to another admonition by the court. According to Judge Lechner, the "inflection of voice

and sarcastic manner of delivery [of this statement] verbally confirmed the disrespect of Mr. Daniels evidenced just a few minutes earlier." Rather than responding to defendant's "dare," Judge Lechner averred that he tried to "defuse the situation." Subsequently, defendant apologized for his conduct.

Recounting the incidents of March 19, 1986, the order noted that when Judge Lechner was deciding the Gilmore motion, defendant "again reacted with seriously offensive and contemptuous conduct." On that occasion, defendant laughed, threw himself back into his chair, shook his head and covered his eyes. As a consequence, defendant was cited for contempt of court. Although acknowledging that Judge Lechner had stated several times that he "finds defendant in

contempt," the order explained that these expressions were "in effect a notification or charge of contempt of court. Mr. Daniels was not held in contempt ... until after he was given an opportunity to be heard with regard to his mens rea and sentencing." Defendant was afforded this opportunity, albeit at a summary hearing.

Defendant's response to the charge of contempt was characterized in the order as a "tirade." In fact, it was once necessary for the trial court to direct defendant to lower his voice. Although defendant apologized, he thereafter offended the trial court by stating in a disrespectful manner, "I'm trying to show the most respect that I can for this court' ... (emphasis as stated)." Moreover, in a contemptuous voice, defendant accused the court of being a

second prosecutor. Admitting to conduct which he had previously denied, defendant attributed his actions to being "human." As indicated in the order, the trial court found defendant's attempt to prove a lack of mens rea disingenuous.

Additionally, the order noted that although defendant maintained that anyone in the courtroom would confirm that he had done nothing disrespectful to the trial court, defendant refused to call any witnesses when given the opportunity to do so. According to Judge Lechner, this failure to call witnesses confirmed that no one could corroborate defendant's protestations of innocence. Defendant's conduct was willful, deliberate and disruptive and his comments "had the effect of lessening the dignity of the court." Finding defendant's conduct to be

"an open threat to the orderly procedure of the Court," Judge Lechner concluded that the "[i]mposition of a custodial sentence was required."

The order further stated that, although the record is silent in this regard, the trial court did in fact consider aggravating and mitigating factors before passing sentence. Although defendant did not address his comments to sentencing, the trial court assumed that all mitigating factors applied to him. Nonetheless, it concluded that the two aggravating factors "qualitatively outweighed all mitigating factors." The aggravating factors mentioned in the order were defendant's conduct and the need to deter him from similar actions in the future. Thus, "it was a balancing of the quality of [the] factors which required

the imposition of incarceration."

Finally, Judge Lechner noted in the order that on two separate occasions on March 19, 1986, a representative from the Office of the Public Defender came to see him in his chambers on behalf of defendant. Judge Lechner stated that he would vacate the jail sentence and reduce the find if defendant would apologize. However, when these offers were conveyed to him, defendant indicated that he was not interested in apologizing.

Having been granted leave of court, defendant supplemented the record with his affidavit of May 1, 1986. In his affidavit, defendant recounted a conversation he had with Thomas P. Simon, Esq., the prosecutor representing the State in State v. McMahon. According to defendant, Simon had stated that although

he saw defendant smiling and shaking his head disapprovingly, he did not hear defendant utter a sound prior to being held in contempt. The affidavit further indicates that Simon described defendant as having vigorously defended his position as many attorneys had done in the past. Likewise, the affidavit states that Judy Kollarik, the official court reporter assigned to Judge Lechner's courtroom on March 19, 1986, did not hear defendant say a word even though she was seated just a few feet from him. Defendant's affidavit states that Ms. Kollarik did see defendant lean back in his chair, put his hand to his forehead and shake his head in disagreement when the trial court began to rule against him on the Gilmore application.

The record was also supplemented with

the April 29, 1986 affidavit of James Tighe, the clerk assigned to Judge Lechner's courtroom at the time of the events in question. Although sitting just a few feet from defendant, Tighe stated that he did not hear defendant say anything prior to being held in contempt. Moreover, Tighe averred that when given an opportunity to be heard, defendant vigorously defended his position without being sarcastic or disrespectful in his manner or tone of voice.

The final affidavit supplementing the record was that of Assistant Prosecutor Simon dated June 2, 1986. Simon recounted how, on March 18, 1986, Judge Lechner stopped the proceedings to admonish defendant for being disrespectful and to warn him that any further actions of that nature would result in his being found in

contempt. Simon stated that during the Gilmore motion on March 19, 1986, he observed defendant sitting "in his chair, waving his hands, shaking his head, and making laughing gestures." Simon was not able to hear any laughter; however, he noted that audibility in the courtroom was poor because several windows were open and it was quite windy. According to Simon, when Judge Lechner accused defendant of repeating his conduct of the previous day, defendant "jumped out of his seat, waved his hand at the Court, and said he was doing none of those things, and he was tired of this kind of 'stuff.'" A confrontation in which defendant accused the trial court of being a second prosecutor culminated in defendant being found in contempt.

Furthermore, Simon asserted that by

taking his statements out of context, defendant's affidavit distorted the meaning of what Simon had said to defendant. Simon stated that he had told defendant that defendant was initially being confrontational with the judge, and that, after defendant calmed down, he argued his point vigorously. Simon opined that by omitting the first part of his comment, defendant's affidavit altered the meaning of what he had said.

Defendant seeks a reversal of his contempt conviction or, alternatively, a reversal and a remand for a hearing pursuant to R. 1:10-2. He seeks this relief on the following grounds set forth in his brief:

POINT I APPELLANT'S CONDUCT DID NOT CONSTITUTE CONTEMPT, AS A MATTER OF LAW.

A. The Tension Between The

CONTEMPT.

A. Summary Procedures Are Disfavored And Are To Be Used Only When Time Is Of The Essence.

B. Even Where Time Is Of The Essence, Other Circumstances In This Case Call For The Use Of R. 1:10-2 Procedures.

1. Because The Allegedly Contemptuous Behavior Constituted An Attack On The Judge's Rulings, The Contempt Charge Should Have Been Heard Pursuant to R. 1:10-2.

2. Summary Procedures Should Not Be Used Where Vital Evidence Can Be Provided By Persons Other Than The Judge.

3. Because The Trial Court Imposed A Sentence Of Incarceration, This Matter Should Have Been Heard

POINT IV EVEN IF APPELLANT'S CONDUCT CONSTITUTED CONTEMPT, THIS MATTER MUST BE REMANDED FOR A HEARING AS TO THE APPROPRIATENESS OF THE SENTENCE.

[1,2] Our duty on an appeal of a summary conviction for contempt is to try the matter de novo on the trial record, upon the law and the facts, towards the end of adjudicating both guilt and punishment. N.J.S.A. 2A:10-3 and R. 2:10-4, In re Yengo, 84 N.J. 111, 135 (1980), cert den., 449 U.S. 1124, 101 S.Ct. 941, 67 L.Ed.2d 110 (1981); In re Spann Contempt, 183 N.J.Super. 62, 65 (App.Div.1982); In re Parsippany-Troy Hills Ed. Ass'n, 140 N.J.Super. 354, 360 (App.Div.1975); In re Ed. Ass'n of Passaic, Inc., 117 N.J.Super. 255, 259 (App.Div.1971), certif. den. 60 N.J. 198 (1972); Bd. of Ed. of Newark v. Newark

Teacher's Union, 114 N.J.Super. 306, 318 (App.Div.1971), certif. den. 58 N.J. 605 (1971), cert. den. 404 U.S. 950, 92 S.Ct. 275, 30 L.Ed.2d 267 (1971). "The only limitation on our power, beyond that applicable to the trial court, is that we may not impose a greater sentence than that which the trial court imposed." State v. Vasky, 203 N.J.Super. 91, 99 (App.Div.1985); Parsippany-Troy Hills Ed. Ass'n, supra, 140 N.J.Super. at 360.

Having studied the entire record in light of this obligation, we are in accord with the trial court's factual findings and legal conclusions and adopt them as our own. We find beyond a reasonable doubt that defendant's conduct constituted contempt in the presence of the court. In reaching this conclusion, we have considered the contentions set out above

and all the arguments advanced by defendant in support thereof and find that, with the sole exception of the issue of punishment, they are clearly without merit. R. 2:11-3(e)(2). Further comment, however, is appropriate with respect to some of the issues raised.

I.

THE PROPRIETY OF THE SUMMARY CONTEMPT PROCEEDINGS UNDER R. 1:10-1

Defendant argues that resort to summary procedures under R. 1:10-1 was inappropriate. Alleging that the jury had been released and the trial ended prior to the onset of the contempt proceedings, defendant contends that there was no need for immediate action to insure the continuity of the trial. Since time was not of the essence, defendant maintains that in order to safeguard his due process

rights, the trial court should have used the "normal" procedures under R. 1:10-2. Defendant also challenges the use of a summary hearing on evidentiary grounds. He contends that his "good faith" explanation for his actions and the existence of factual disputes concerning this conduct necessitated a full hearing at which evidence from persons other than the judge could be adduced. Furthermore, defendant argues that the allegedly contemptuous conduct was a personal attack on the judge who took offense and lost all objectivity. Therefore, the charge of contempt should have been heard by another judge. Additionally, defendant asserts that because he was sentenced to imprisonment and because summary proceedings diminish one's due process rights, a balancing of the competing

interests dictates that the contempt charge should have been heard pursuant to R. 1:10-2. According to defendant, a R. 1:10-2 hearing is a least restrictive alternative, vis-a-vis the infringement of his constitutional rights, which should have been invoked in this case. Lastly, even if a summary hearing were justified, defendant claims that he was denied the right to be heard and the right to counsel. Consequently, he contends that "the proceeding below was fundamentally unfair and the finding of contempt must be reversed."

A.

Summary Proceedings Pursuant To R. 1:10-1 Were Justified

[3,4] Defendant's assertion that summary proceedings are appropriate only when time is of the essence is unsupported

by New Jersey case law. "Contempt in the actual presence of a judge may be adjudged summarily by the judge without notice or order to show cause." R. 1:10-1; Yengo, supra, 84 N.J. at 121; In re Contempt of Carton, 48 N.J. 9, 21 (1966); Vasky, supra, 203 N.J.Super. at 98; In re Hinsinger, 180 N.J.Super. 491, 495 (App.Div.1981). The power to punish summarily for contempts committed in the face of the court, "although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions." Ex parte Terry, 128 U.S. 289, 313, 9 S.Ct. 77, 83, 32 L.Ed. 405, 412 (1888). See also In re Contempt of Ungar, 160 N.J.Super. 322, 330 (App.Div.1978). The need to control the proceedings may compel swift action. See Carton, supra,

48 N.J. at 21. Not only does obedience to orders of the court, but any misbehavior which tends to impede the administration of justice may constitute a contempt. See Sarner v. Sarner, 28 N.J. 519, 524 (1959), app. dism. and cert. den., 359 U.S. 533, 79 S.Ct. 1137, 3 L.Ed.2d 1028 (1959). This includes conduct of an attorney which tends to obstruct justice. See In re Logan, Jr., 52 N.J. 475 (1968). However, since the power to punish directly inevitably diminishes the procedural due process accorded the alleged contemnor, the power must be permitted only where necessary. See Harris v. United States, 382 U.S. 162, 165, 86 S.Ct. 352, 354, 15 L.Ed.2d 240, 242 (1965). See also Yengo, supra, 84 N.J. at 122.

In Yengo, for example, the attorney Yengo was held in contempt for taking a

trip to Bermuda during a complex gambling conspiracy trial in which his client was one of numerous defendants. Although Yengo had briefed one of his colleagues to proceed in his stead, Yengo's client had consented to this substitution of attorney and the trial proceeded as scheduled, Yengo was summarily found guilty of contempt and fined $500 upon returning from Bermuda. We reversed and remanded, holding that Yengo's conduct constituted an indirect contempt requiring notice and hearing pursuant to R. 1:10-2 and R. 1:10-4. In re Yengo, 167 N.J.Super. 66, 70 (App.Div.1987). However, the Supreme Court disagreed. Finding that Yengo's unexcused absences and frivolous explanation therefore was a direct contempt, the Court reinstated the summary contempt conviction and $500 fine. Thus,

despite the absence of any urgency for an expedited hearing, the trial court's resort to summary proceedings was upheld by our Supreme Court.

[5] Likewise, in Hinsinger, supra, defendant was cited for contempt for refusing to testify despite the trial court's instruction that he do so. Six days later, at a summary hearing conducted pursuant to R. 1:10-1, defendant was found guilty of contempt and sentenced to a six-month term in county jail. Although the need for immediate action due to defendant's refusal to testify had passed long before defendant's contempt hearing, we upheld the trial court's use of summary procedures. Hinsinger, like Yengo, refutes defendant's argument that, because time was not of the essence, the trial court erred in summarily trying him for

contempt.

Defendant also claims that there was a factual dispute as to the nature of his conduct and that the resolution of this controversy required a plenary hearing at which additional, crucial evidence could have been presented. To support his assertion that a dispute existed, defendant points to the purported discrepancies between the transcript of the proceedings and the trial court's "embellished" supplemental order. Similarly, defendant maintains that the trial court's account of what transpired conflicts with the recollection of others who were present in the courtroom. Because of these alleged inconsistencies and the fact that defendant's conduct consisted largely of silent, physical gestures, defendant argues that a R. 1:10-

2 hearing was necessary to elicit more testimony. Finally, defendant contends that his good faith explanation--that his actions were merely a human response--was another reason why a summary proceeding was improper.

Neither the facts of this case nor the law of contempt support the arguments advanced by defendant. Contrary to what defendant avers, there are no discrepancies between the trial transcript and the supplemental order of contempt. On March 18, 1986, the trial court noted that defendant was "sitting there shaking [his] head, smiling and being disrespectful." Likewise, on March 19, 1986, the trial court stated for the record that defendant "laughed ... rolled [his] head [and] threw [himself] back in [his] seat." Immediately before defendant

was given an opportunity to be heard, the trial court found that he was "laughing and smiling again." Although the supplemental order of March 24, 1986 is more detailed and frequently characterizes defendant's conduct and the manner in which he addressed the trial court as contemptuous, sarcastic and disrespectful, it does not conflict in any material respect with the transcript of the proceedings. Likewise, the affidavits of Tighe, Simon and Daniels basically accord with the events as recited in the supplemental order. The affidavits corroborate the trial court's description of defendant's actions and facial expressions; however, none of the affiants actually heard defendant laugh. Whether this fact is attributable to the difficulty in hearing caused by the open

courtroom window or the quietness of defendant's laughing gestures does not impact significantly on the outcome of this case. It merely suggests that if defendant's conduct was contumacious, it was not so because of its audibility. Thus, there was no dispute necessitating a full hearing at which testimony could be taken.

Moreover, where, as here, the contumacious conduct occurred entirely in the trial court's presence and calling witnesses would not bring to light any information beyond that which the judge had himself perceived, no purpose would be served by conducting a plenary hearing. As we stated in State v. Gonzalez, 134 N.J.Super. 472, 477 (App.Div.1975), aff'd as modified 69 N.J. 397 (1975):

All the conditions which justify

summary convictions for contempt during a trial were present here. Defendant's contemptuous conduct occurred in open court and was directly witnessed by the judge. Immediate treatment was necessary to preserve order and a deliberate atmosphere in the courtroom.

Although conceding that "defendant's alleged contempt was in the presence of the court and thus was subject to summary adjudication by the trial judge pursuant to R. 1:10-1," (at 592), our dissenting colleague concludes that certain ambiguities in the record warrant remanding this matter for an evidentiary hearing. In our view, such an approach is inconsistent and would unjustifiably undercut the summary power of contempt. Here, the trial court was exposed to all

of the conduct and language which resulted in the contempt citation and, therefore, was expressly authorized to try defendant summarily. In doing so, the trial court accorded defendant a right of allocution and an opportunity to call witnesses. Defendant declined to call any witnesses on his behalf; however, he later supplemented the record with his affidavit and that of one other observer. After carefully considering these affidavits and the one submitted by Assistant Prosecutor Simon, we cannot conclude that there was a conflict, the resolution of which required additional testimony. Moreover, even if, contrary to our conclusion, further testimony should have been elicited, the time for doing so was at the summary hearing. By choosing instead to rely upon the affidavits, defendant cannot transform

the nature of his actions into that of an indirect contempt and thereby secure a plenary hearing to which he was not entitled.

Additionally, defendant's argument that his good faith explanation warranted proceeding by order to show cause was considered and rejected by this court in Hinsinger, supra. There, a psychiatrist testifying on defendant's behalf at the summary contempt hearing opined that defendant's refusal to testify was attributable to "a 'factitious disorder' producing his mutism predicated on a clear underlying mental disorder." 180 N.J.Super. at 494. Relying upon Yengo, defendant in Hinsinger, contended that since an adequate explanation was offered for his conduct, the matter should have been tried by a different judge at a full

hearing.

In Hinsinger, we observed that Yengo does not stand for the proposition that whenever a legitimate explanation is offered a direct contempt becomes indirect and thus inappropriate for summary proceedings. We noted that in Yengo, the Supreme Court focused exclusively on whether an attorney's absence from court constituted a direct or indirect contempt. Explaining that a crucial element of that offense was the attorney's explanation which may refer to facts not before the court, the Yengo court held that the adequacy of the explanation would determine how the offense was to be categorized and thus whether summary procedures were justified. Noting that Yengo was inapplicable to that case, in which the contemptuous omission was the

witness' refusal to testify which occurred in the trial court's presence, we held that the trial court's resort to summary procedures was proper. Because almost every contempt calls for an explanation, we found that defendant's interpretation of Yengo would vitiate the summary contempt proceeding. Moreover, we concluded that that defendant's theory would:

> violate the principle that the trial court must have inherent power to punish direct affronts to its authority swiftly, in order to ensure obedience to court orders and respect for the court. [180 N.J.Super. at 497].

[6] Here, too, defendant erroneously relies upon Yengo, in support of his claim that his good faith explanation required

that the charge of contempt be adjudicated at a plenary hearing. For the reasons expressed in Hinsinger, we reject this argument. Furthermore, it is extremely doubtful that defendant's explanation--that his conduct was simply a human reaction--would be deemed "adequate" according to any standard. Cf. State v. Sax, 139 N.J.Super. 157, 159 (App.Div.1976), certif. den. 70 N.J. 525 (1976) (defendant held in contempt despite his excuse that his abusive comment and gutter language was due to frustration). Nor does the possibility that the trial court erred in ruling on the Gilmore motion render defendant's conduct or explanation therefore acceptable. As the Supreme Court stated in Carton, supra:

> There must be no defiance of a court, least of all by one of its officers.

> It is no excuse that the trial judge may be in error. Courts of appeal exist to hear such claims. One who is dissatisfied with the action of a court must obtain a stay or obey the order. He may not ignore it. [48 N.J. at 16].

[7] Another ground on which defendant challenges the appropriateness of summary proceedings in this case is that the trial court had become so personally embroiled in the matter that it was incapable of rendering a dispassionate decision. According to defendant, his "allegedly contemptuous conduct--expressions of disapproval with the judge's ruling--is one of the most direct and personal attacks on the judge, challenging not only his authority but his intellect as well." As evidence of the trial court's

indignance and loss of objectivity, defendant claims that the trial court committed sundry errors in the course of the contempt proceedings. Thus, defendant maintains that this case "should have been heard by another judge pursuant to R. 1:10-2."

For several reasons, this argument is entitled to little credence. Preliminarily, one should note the inconsistency in defendant's position: while arguing that the alleged contumacious acts were so offensive as to require Judge Lechner to recuse himself, defendant also asserts that his conduct did not constitute contempt as a matter of law. Furthermore, defendant's argument is refuted by several reported decisions in which judges who were the target of conduct clearly more offensive than

defendant's were permitted to preside at summary contempt proceedings. See, e.g., Vasky, supra, 203 N.J.Super. at 97 (although not the basis on which the trial court found defendant in contempt, the trial court heard defendant call it a "scumbag"); Gonzalez, supra, 134 N.J.Super. at 474 (defendant uttered vulgarities concerning all involved in the proceedings then directed additional scurrilous remarks to the court). But see Cooke v. United States, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767, 768, 775 (1925) (defendant's letter to the trial court stating that the judge was not "big enough to overcome ... personal prejudice" and accusing the judge of being influenced by extraneous, slanderous remarks required that a different judge hear the case on remand). In addition, the trial court did

not commit the errors attributed to it by defendant. Thus, defendant's claim that the circumstances of this case warranted Judge Lechner to recuse himself is unfounded.

[8] Also unavailing is defendant's assertion that, because he faced incarceration and summary proceedings diminish one's due process rights, the least restrictive alternative of a R. 1:10-2 hearing should have been employed. In analyzing claims under the state constitution, our Supreme Court has "considered the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." Greenberg v. Kimmelman, 99 N.J. 552, 567 (1985). See Right to Choose v. Byrne, 91 N.J. 287, 308-309 (1982). In light of the

panoply of safeguards afforded an individual in a criminal contempt proceeding, and the compelling need for judges to be able immediately to quell disrespectful conduct committed in their presence, the factors set forth in Greenberg unquestionably point to upholding the use of summary contempt procedures in appropriate circumstances. In both the court rules it has adopted and numerous decisions, our Supreme Court has determined that the circumstances of a direct contempt, such as the one at issue here, are appropriate for invoking the summary contempt power. Likewise, the United States Supreme Court, while recognizing that 'procedural regularity' has been a cornerstone in the development of our liberty, has condoned the use of summary contempt hearings in limited

situations. Harris, supra, 382 U.S. at 166-69, 86 S.Ct. at 355-57, 15 L.Ed.2d at 243-44; In re Oliver, 333 U.S. 257, 275, 68 S.Ct. 499, 508, 92 L.Ed.2d 682, 695 (1948). Thus, defendant's argument that the right of procedural due process as guaranteed by our state and federal constitutions precludes summarily trying an individual for contempt must be rejected.

B.

Defendant Was Not Denied Due Process Of Law By Virtue Of The Alleged Procedural Irregularities In The Hearing.

Defendant further argues that even if resort to summary proceedings was justified, certain errors committed by the trial court denied him procedural due process. Defendant alleges that the trial court found him in contempt before giving

him an opportunity to speak. Therefore, defendant continues, he was denied his right to be heard. Furthermore, defendant maintains that by imposing a prison sentence without allowing him to consult with an attorney, the trial court deprived him of his right to counsel. According to defendant, these purported errors resulted in a proceeding which was fundamentally unfair and thus require a reversal of his conviction for contempt.

Defendant attaches great significance to the fact that before he was given a chance to speak, the trial court twice stated that it "finds him in contempt" and also declared that the jury will be released. According to defendant, these comments indicate that the trial court had found him in contempt before he was able to address the issues of guilt and

punishment. Thus, defendant argues that his right of allocution was a "meaningless formalism" and he was, in essence, denied the opportunity to be heard.

In Vasky, supra, defendant was twice held in contempt for interrupting the proceedings. After admonishing defendant and having a lengthy confrontation with him, the trial court called a recess and, upon reconvening, stated:

> Mr. Vasky, please stand. Mr. Vasky, I find that your action in refusing to obey the court's order [to be quiet] is in direct contempt in the face of the Court. I find you guilty of that contempt. Mr. Vasky, I'll hear you on the punishment for that contempt. [203 N.J.Super. at 95 (Emphasis supplied)].

Defendant used the opportunity to argue

that the trial court had violated his constitutional rights and that no sentence should be imposed because he had done nothing wrong. Nonetheless, the trial court assessed a $250 fine for this conviction for contempt.

When defendant persisted in his obstreperous conduct, the trial court cleared the courtroom, again held defendant in contempt and allowed him to speak as to the sentence to be imposed. Defendant again protested that he had done nothing to warrant a finding of contempt. Thereafter, a sentence of 15 days in jail was imposed. The underlying matter for which defendant was standing trial proceeded to conclusion without further interruption.

In its de novo review of the contempt convictions, this court addressed

defendant's claim that he lacked the requisite mens rea to support a finding of criminal contempt. We thus noted:

> While it is true that the trial judge did not specifically say that defendant had the opportunity to dispel the presence of criminal intent, it is evident that he was afforded that opportunity. The judge couched that opportunity in terms of inviting defendant to address himself to the sentence to be imposed. [Id. at 100].

This court adopted the trial court's findings of fact and affirmed both contempt convictions. In so holding, we explained "that the persistent refusal of defendant to accede to the directions of the trial judge constituted contempt in the face of the court and warranted his

conviction for contempt." Id. at 101.

[9] Vasky makes clear that a defendant is not denied his right to be heard merely because a trial court announces that it finds him in contempt before the defendant has had a chance to speak. The crucial consideration is whether a defendant is afforded an opportunity to address the court. Cf. United States v. Baldwin, 770 F.2d 1550, 1556 n.11 (11th Cir. 1985), cert. den. sub nom. Jackson v. United States, ___ U.S. ___, 106 S.Ct. 1636, 90 L.Ed.2d 182 (1986) (although defendant was summarily cited for contempt for being absent from court, the trial court would undoubtedly have modified its judgment had defendant's subsequent explanation brought to light facts not already known to the court). Here, defendant was in fact given that

opportunity. After reading the definition of contempt as set forth in Vasky, the trial court here told defendant:

> Now I will accord you an opportunity to show that you did not possess at the time the requisite mens rea ...
>
> * * * * * * * * * * *
>
> You may be heard before I pass sentence.

Defendant gave a lengthy explanation for his conduct, after which the trial court inquired whether he wished to say anything further or call any witnesses. Although declining to offer additional evidence on his behalf, defendant enjoyed a full right of allocution. His assertion to the contrary is unfounded.

[10] Defendant also argues that the trial court's refusal to allow him to

consult with an attorney constituted a violation of his right of procedural due process and right to counsel as guaranteed by our federal and state constitutions. With respect to his federal constitutional rights, defendant relies principally upon Argersinger v. Hamlin, 407 U.S. 25, 36, 92 S.Ct. 2006, 2012, 32 L.Ed.2d 530, 538 (1972), in which the United States Supreme Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at trial." Regarding his rights under the New Jersey Constitution, defendant points to our Supreme Court's holding in Rodriguez v. Rosenblatt, 58 N.J. 281, 295 (1971), that "no indigent defendant should be subjected to a

conviction entailing imprisonment in fact or other consequence of magnitude without first having had due and fair opportunity to have counsel assigned without cost." On the basis of these and several other cases, defendant maintains that his constitutional rights were violated and, therefore, his conviction for contempt must be reversed.

The United States Supreme Court's holding in Argersinger was motivated by several key considerations. In explaining why the assistance of counsel is a requisite to a fair trial, the Supreme Court noted:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and

> sometimes no skill in the science of law.... He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. [407 U.S. at 31, 92 S.Ct. at 2009, 32 L.Ed.2d at 535].

Additionally, the concern that all defendants, rich and poor alike, stand equal before the law was instrumental in the Supreme Court's decision. The Argersinger court further reasoned that the need for counsel is just as urgent in petty-offense prosecutions where the issues involved are often as complex as those in felony cases. Another factor underlying the Supreme Court's decision was that misdemeanants as well as felons

require guidance at the guilty plea stage to ensure that they understand the consequences of their pleas and that they are treated fairly by the prosecution. Also crucial to the Supreme Court's holding was the fact that the judicial system's preoccupation with the movement of cases frequently prejudices defendants charged with misdemeanors. The Supreme Court determined that the assistance of counsel was a necessary bulwark against this problem of assembly-line justice.

As Justice Powell pointed out in his concurrence in Argersinger, that case, like Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), embraced the larger concern of when the Due Process Clause requires that a defendant be represented by counsel. Argersinger, supra, 407 U.S. at 44-46, 92

S.Ct. at 2016-2017, 32 L.Ed.2d at 542-543 (Powell, J., concurring). The Supreme Court held that no person may be imprisoned for an offense unless he was represented by counsel at his trial, and, in reaching this conclusion, twice cited In re Oliver, supra. An examination of that decision provides guidance in the instant case.

In Oliver, petitioner was sentenced to 60 days imprisonment upon being convicted of contempt for allegedly testifying evasively before a one-man, judge-grand jury. While questioning petitioner in his capacity as a grand jury, the judge disbelieved petitioner's story, which conflicted with other testimony that had previously been given in a secret proceeding. The judge therefore charged petitioner with

contempt. The summary contempt hearing, like the grand jury investigation which precipitated it, was likely conducted in the judge's chambers and was closed to the public.

For several reasons, the United States Supreme Court concluded in Oliver that petitioner's conviction for contempt could not stand. One ground on which the conviction was overturned was that the contempt proceedings had been conducted in secret. The Court further held that the "failure to afford the petitioner a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law." 333 U.S. at 273, 68 S.Ct. at 507, 92 L.Ed. at 694. The Supreme Court explained:

> Except for a narrowly limited

category of contempts, due process of law as explained in the Cooke Case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where

> immediate punishment is essential to prevent "demoralization of the court's authority" before the public. If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires, according to the Cooke Case, that the accused be accorded notice and a fair hearing as above set out. [Id. at 275, 68 S.Ct. at 508, 99 L.Ed.2d at 695 (Emphasis supplied)].

Because petitioner's contempt conviction was based, in part, upon testimony given in his absence, the Court concluded that that case did not fall within the narrow category of contempts which would allow abridging petitioner's due process rights.

Having cited to Oliver, the Argersinger court was undoubtedly aware of the implications of that decision--that an individual who commits contempt in the presence of the court can be tried instantly and sentenced to jail, even though he may not have been represented by counsel. Nonetheless, the Supreme Court did not overrule Oliver or modify that decision to comport with its holding in Argersinger. Thus, there is a compelling basis to conclude that the United States Supreme Court intended to keep intact the judicial power to punish summarily for contempts in facie curiae. Defendant's argument to the contrary must be rejected.

Moreover, even in the unlikely event that Argersinger should be read as limiting the use of the summary contempt power, the instant case is not one in

which any such limitation would apply. Defendant is not a layman who is innocent but too unskilled in the practice of law to establish that fact. He is an experienced trial attorney who obviously understood the charges brought against him and could have responded thereto. There was no danger that the complexity of the issues involved or the "assembly-line" nature of the hearing resulted in any prejudice that the presence of outside counsel would have averted. Likewise, defendant here was not indigent or unable to appreciate the consequences of a guilty plea. In short, none of the rationales underlying the holding in Argersinger are present here. Thus, Argersinger cannot and should not be interpreted as extending the right to counsel to defendant in this case.

Similarly, we are satisfied that, despite its holding in Rodriguez, supra, the New Jersey Supreme Court intended to preserve the court's summary contempt power. Nine years after deciding Rodriguez, our Supreme Court upheld the use of summary contempt proceedings in Yengo. There is no indication in Yengo that defendant had outside counsel when he was summarily tried before the trial court. However, his conviction was affirmed. The Court recognized that summary proceedings diminish one's due process rights, but, nevertheless, upheld the summary contempt power as a necessary incident to maintaining the dignity of the court. In light of the holding in Yengo, defendant's reliance upon Rodriguez is misplaced. The instant case involved contempt in the presence of the court,

and, therefore, due process did not mandate that defendant be represented by an attorney.

Consequently, as defendant's contumacious conduct occurred in the actual presence of the court and no evidence from other sources was necessary to adjudicate the contempt charge, the trial court properly invoked summary procedures. In addition, there were no procedural irregularities in the contempt proceedings to warrant overturning defendant's conviction.

II.

DEFENDANT'S CONDUCT CONSTITUTED CONTEMPT AS A MATTER OF LAW

Defendant argues that his gestures and physical reactions did not materially disrupt the proceedings, and, therefore, did not rise to the level of contempt.

Defendant characterizes his conduct as a "human reaction," an "involuntary reflex or release of tension," and an "isolated incident [which] ... took place outside the presence of the jury." Moreover, he asserts that his comments to the trial court were not the basis of his being held in contempt and, furthermore, were not disrespectful. According to defendant, "[t]he only disruption in the proceeding came as a result of the judge's own reaction to [defendant's] off-the-record conduct and his decision to enter the contempt citation." Similarly, defendant maintains that he was cited for contempt not because he obstructed justice, but because the trial court took umbrage at his conduct. Other considerations which defendant asserts militate against a finding that his conduct was contumacious

are an attorney's "duty to vigorously defend his client" and the "adversarial nature of the trial process." Lastly, defendant contends that he lacked the requisite mens rea to support his contempt conviction and also that the trial court improperly shifted to him the burden of proving that he lacked the necessary intent.

Although acknowledging the expansive definition of contempt employed by the courts of this State, defendant relies primarily upon federal cases in arguing that his conduct did not constitute contempt. Resort to federal case law is justified, in defendant's view, because the federal statute and rule are similar to those of New Jersey, because New Jersey courts have frequently looked to the larger body of federal law when addressing

issues of contempt and because the contempt power may implicate federal as well as state constitutional rights. To a certain extent, each of these observations is valid. However, they cannot obscure the overriding principle that, unless a provision of the United States Constitution is involved, federal precedent is in no way binding upon this tribunal. As the constitutional issues implicated in this appeal have already been addressed, this court may accord little significance to the federal cases cited by defendant. Reference to the law of other jurisdictions should be reserved for those issues not adequately covered by the abundance of New Jersey law dealing with contempt.

Citing myriad federal cases, defendant maintains that a finding of

contempt will not lie absent a "material disruption in or obstruction of a matter pending." Indeed, this is a correct statement of federal law. See In re McConnell, 370 U.S. 230 233, 82 S.Ct. 1288, 1290, 8 L.Ed.2d 434, 437 (1962); In re Michael, 326 U.S. 224, 226-229, 66 S.Ct. 78, 79-80, 90 L.Ed. 30, 32-33 (1945); Nye v. United States, 313 U.S. 33, 43-52, 61 S.Ct. 810, 813-17, 85 L.Ed. 1172, 1178-1182 (1941); United States v. Lowery, 733 F.2d 441, 445 (7th Cir.1984), cert. den. sub nom. Wolfson v. United States, 469 U.S. 932, 105 S.Ct. 1327, 71 L.Ed.2d 264 (1984); United States v. Thoreen, 653 F.2d 1332, 1340 (9th Cir.1981), cert. den. 455 U.S. 938, 102 S.Ct. 1428, 71 L.Ed.2d 648 (1982); In re Gustafson, 650 F.2d 1017, 1020 (9th Cir.1981); Gordon v. United States, 592

F.2d 1215, 1217 (1st Cir.1979, cert. den. 441 U.S. 912, 99 S.Ct. 2011, 60 L.Ed.2d 384 (1979); Com. of Pa. v. L.U. 542, Intern. U. of Op. Engrs., 552 F.2d 498, 509 (3d Cir.1977), cert. den. sub nom. Freedman v. Higginbotham, 434 U.S. 822, 98 S.Ct. 67, 54 L.Ed.2d 79 (1977); United States v. Seale, 461 F.2d 345, 369 (7th Cir.1972); In re Brown, 454 F.2d 999, 1003-1004 (D.C. Cir.1971). In contast, we have been unable to find any reported New Jersey decision which holds that a material disruption is a sine qua non of a contempt conviction. Those cases which refer to the "obstruction of the administration of justice" explain that any conduct which has such a tendency may be punished as contemptuous. See, e.g., Sarner, supra, 28 N.J. at 524, Van Sweringen v. Van Sweringen, 22 N.J. 440,

445 (1956); Harbor Tank Storage Co., Inc. v. De Angelis, 95 N.J.Super. 92, 99 (App.Div.1964), aff'd 45 N.J. 539 (1965); State v. Jones, 105 N.J.Super. 493, 503 (Essex Co. 1969); In re Caruba, 139 N.J.Eq. 404, 411 (Ch. 1947), aff'd 140 N.J.Eq. 563 (E. & A. 1947), cert. den. 335 U.S. 846, 69 S.Ct. 69, 93 L.Ed. 396 (1948).

The reason for this difference between federal and New Jersey case law is apparent upon examining the respective statutes defining contempt. 18 U.S.C. § 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as--
>
> (1) Misbehavior of any person in its

presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

The New Jersey counterpart, N.J.S.A. 2A:10-1, reads:

The power of any court of this state to punish for contempt shall not be construed to extend to any case except the:

a. Misbehavior of any person in the actual presence of the court;

b. Misbehavior of any officer of the court in his official transactions; and

> c. Disobedience or resistance by any court officer, or by any party, juror, witness or any person whatsoever to any lawful writ, process, judgment, order, or command of the court.
>
> Nothing contained in this section shall be deemed to affect the inherent jurisdiction of the superior court to punish for contempt.

Although the statutes are similar, it is clear that the New Jersey statute is more encompassing. Under N.J.S.A. 2A:10-1a, a court is empowered to sanction an individual for contempt for any misbehavior committed in its presence. Under 18 U.S.C. § 401(1), a federal court can exercise its contempt power only if the misbehavior committed in the face of the court obstructs the administration of

justice.

[11] In light of this distinction, we reject defendant's argument, based upon federal case law, that his conduct did not cause a material disruption and therefore was not contemptuous. Simply put, the State need not prove that there was an obstruction of justice in order to sustain defendant's conviction. In this respect, Caruba, supra, is enlightening. There, defendant was held in contempt for committing perjury and, like defendant in the instant case, apparently argued that his conviction was improper behavior because his conduct did not obstruct justice. Dismissing this argument, the Caruba court explained:

> The federal cases cited in support of the argument that where there is no obstruction of justice there is no

contempt are not controlling. They all arose out of contempt proceedings in inferior federal courts, the creatures of statute, having no common law jurisdiction in matters of contempt, and the decisions were controlled by statute. They need not be further considered here. None of the New Jersey cases cited is authority for the proposition advanced. They hold uniformly that any act or conduct which obstructs or tends to obstruct the course of justice constitutes a contempt of court. "The essence of contempt is that it obstructs or tends to obstruct the administration of justice." Fox, The History of Contempt of Court 216. And see Toledo Newspaper Co. v. United

States, 247 U.S. 402 [38 S.Ct. 560, 62 L.Ed. 1186 (1918)] [139 N.J.Eq. at 410-411 (Emphasis in the original)].

This reasoning applies with equal force to this case and warrants rejecting defendant's argument insofar as it is grounded in federal law.

Moreover, in Sax, supra, this court upheld a summary contempt conviction against a defendant who, after receiving a parking ticket, wrote a letter to a municipal court clerk containing obscenities and alleging "ugly" methods of collecting money. Similarly, this court held in State v. Gussman, 34 N.J.Super. 408 (App.Div.1955), that a traffic ticket recipient's letter to a judge claiming that he would not receive a fair trial justified summarily convicting him for

contempt. Clearly, there was no material disruption of the proceedings in either Sax or Gussman, but, nonetheless, this court opined that the convictions for contempt were warranted. Furthermore, both Sax and Gussman, were cited with approval by the New Jersey Supreme Court in Yengo. 84 N.J. at 123. As Justice Handler noted in his concurrence in Yengo:

> A trial need not grind to a halt before obstreperous conduct can be regarded as a contemptuous affront to judicial authority. The combination of a purposeful attempt to interfere with the court and intentional acts which have the tendency to obstruct a court is sufficient. [84 N.J. at 136 (Handler, J., concurring)].

[12] New Jersey courts have determined that any act in opposition to

or which tends to lessen or bring into disrepute the court's authority or dignity is punishable as contempt. Vasky, supra, 203 N.J.Super. at 99; Gonzalez, supra, 134 N.J.Super. at 475. Under this standard, defendant's conduct was clearly contemptuous. During the first day of pretrial hearings, the trial court was indulgent of defendant's repeated challenges to its rulings on the polygraph issues. Defendant was afforded ample opportunity to contest each decision but his arguments were unavailing. Obviously disappointed, defendant flouted the court's authority by "shaking [his] head, smiling and being disrespectful" in response to the trial court's refusal to take judicial notice of certain polygraph articles. Upon being warned that further such antics would not be tolerated,

defendant again acted defiantly, daring the trial court to take whatever action it deemed necessary. Thereafter, defendant apologized for his behavior and explained that it was a human response. A repetition of these laughing, mocking gestures on the following day culminated in defendant's citation for contempt. This conduct smacked of disrespect and, as the trial court stated, "besmirch[ed] what [was] going on in th[e] court." Moreover, the record suggests that the manner in which defendant addressed the trial court when given an opportunity to be heard was likewise insolent. Thus, the trial court was warranted in holding defendant in contempt.

The conclusion that defendant's conduct constituted contempt is in no way vitiated by the fact that it occurred

while he was "vigorously defending" a client in a criminal matter. An attorney's actions which demean a trial court neither aid the search for truth nor conduce to the benefit of a defendant. Thus, eradicating this type of behavior through the contempt power will not threaten the "independence of the bar", "chill or effectively deny a defendant's right to counsel" or result in "an atmosphere of decorous understatement." As the United States Supreme Court commented in Sacher v. United States, 343 U.S. 1, 13, 72 S.Ct. 451, 457, 96 L.Ed. 717, 726 (1952), in response to similar arguments, a court should:

> unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on

> behalf of any person whatsoever. But it [should] not equate contempt with courage or insults with independence. It [should] also protect the processes of orderly trial, which is the supreme object of the lawyer's calling.

Moreover, measures which help insure that an attorney comports himself with proper etiquette in the courtroom are likely to better serve the interests of a criminal defendant. Despite defendant's responsibilities as a Public Defender, the contemptuous nature and recurrence of his conduct justified the trial court in summarily finding him in contempt.

[13] Defendant further argues that he lacked the necessary intent to support his conviction for contempt and also that the trial court erroneously shifted the burden

of proof regarding mens rea to him. It is well-settled that an essential element of the offense of contempt which must be proved beyond a reasonable doubt is willfulness or intentional conduct. Carton, supra, 48 N.J. at 19; N.J. Dept. of Health v. Roselle, 34 N.J. 331, 337 (1961). Here, after citing defendant for contempt, the trial court remarked:

> Now I will accord you an opportunity to show that you did not possess at the time the requisite mens rea ...

Although defendant's argument that the trial court improperly required him to prove a lack of intent has surface appeal, an examination of the relevant law and the facts of this case discloses the flaws in this argument.

In Vasky, supra, defendant, who was twice held in contempt for persistently

refusing to obey the directions of the trial court, likewise contended that his conduct was not willful or deliberate. As previously noted, the procedure followed in Vasky for each contempt citation was that the trial court found defendant in contempt and then told him that he could address the issue of punishment. Although the trial court made no mention of defendant's mens rea, we upheld both convictions. With respect to the element of intent, we explained:

> While it is true that the trial judge did not specifically say that defendant had the opportunity to dispel the presence of criminal intent, it is evident that he was afforded that opportunity. The judge couched that opportunity in terms of inviting defendant to address himself

> to the sentence to be imposed. ... That defendant possessed the requisite intent is clearly demonstrated by the fact that he composed himself and ceased his interruptions of the court after the jail sentence was imposed. [203 N.J.Super. at 100 (Emphasis supplied)].

Because, in Vasky, the element of willfulness was readily inferable from the nature of defendant's conduct, we found that defendant had the requisite mens rea and, although given the opportunity to do so, was unable to dispel Its existence. See Hinsinger, supra, 180 N.J.Super. at 497 ("[T]he contemnor must be accorded the opportunity, as defendant was here, to attempt to show that he did not possess the requisite mens rea.").

[14] Vasky and Hinsinger make clear that, as with certain crimes, the very nature in which a contemptuous act is committed may support a finding that it was done with the requisite mens rea. Here, the trial court's finding that defendant acted willfully and deliberately is amply supported by the record. After the initial confrontation with the court on the first day of pretrial hearings, defendant was able to comport himself properly and, indeed, apologized to the trial court. Despite recognizing the impropriety of his conduct and showing that he could conduct himself in a manner befitting a court of law, defendant repeated his contumacious acts the following day. Moreover, in his brief, defendant attempts to defend his "expressions of disapproval" as a

"tactical weapon" designed to influence subsequent decisions by the trial court. In so describing his behavior, defendant concedes that his conduct was intentional, done for a specific purpose. Thus, defendant's contention that "[i]t is difficult to characterize [his] physical reaction as volitional; it is impossible to conclude beyond a reasonable doubt that it was intentionally wrongful" is unpersuasive. Both the nature of defendant's conduct and his own admission about its intended effect support the conclusion that defendant acted with the necessary mens rea. Since he did not offer an explanation to refute this finding, his conviction must stand.

Several other issues raised by defendant merit brief consideration. Defendant claims that the trial court's

willingness to reduce his sentence in exchange for an apology evidences that the trial court had become personally embroiled and also that defendant could not have materially disrupted the proceedings. Logically unsound, this argument is refuted by federal decisions which have recognized the reasonableness of commuting a sentence when a defendant has shown remorse. Baldwin, supra, 770 F.2d at 1556 n.11. See Groppit v. Leslie, 404 U.S. 496, 506 n.11, 92 S.Ct. 582, 588 n.11, 30 L.Ed.2d 632, 640 n.11 (1972).

[15] Defendant also suggests that the fact that his conduct occurred outside the presence of the jury weighs against concluding that it was contemptuous. In Gonzalez, defendant's acts of contempt were committed during sentencing and, thus, also occurred outside the jury's

presence. Addressing this factor, the Gonzalez court explained:

> That is a distinction without a difference. All the conditions which justify summary convictions for contempt during a trial were present here. Defendant's contemptuous conduct occurred in open court and was directly witnessed by the judge. Immediate treatment was necessary to preserve order and a deliberate atmosphere in the courtroom. [134 N.J.Super. at 477].

This reasoning applies with equal force here.

[16] Lastly, defendant observes that holding that his conduct constituted contempt may have First Amendment implications. A similar argument was rejected by this court in Sax, supra,

where it was noted that contumacious speech is not protected since it does not excite "society's interest in truth and individual liberties." 139 N.J.Super. at 160 (quoting Gussman, supra, 34 N.J.Super. at 413). Thus, these considerations do not warrant altering our conclusion that defendant's conduct clearly falls within the definition under which courts of this State have punished such behavior as contemptuous. All elements of the offense, including defendant's mens rea, were established beyond a reasonable doubt.

III.

THE APPROPRIATENESS OF DEFENDANT'S PUNISHMENT

Finally, defendant contends that "the sentencing procedures used by the judge [were] so laden with error that the

sentence imposed by the trial court judge cannot stand." Specifically, defendant argues that the presumption against imprisonment was applicable to him and that, at the time of sentencing, the trial court failed to explain how that presumption was rebutted. Likewise, defendant maintains that the trial court considered neither the existence of any aggravating or mitigating factors nor whether his immediate incarceration would work an undue hardship on his family and/or clients. In defendant's view, the trial court's discussion of the aggravating and mitigating factors in the supplemental order was an "after-the-fact effort to cure the error" and cannot rectify the trial court's failure to consider certain crucial evidence before passing sentence. In conclusion,

defendant claims entitlement "to a hearing to determine the appropriate sentence under the principles set forth in State v. Vasky."

[17] While the trial court was required to consider the nature and circumstances of defendant's contempt, including aggravating or mitigating factors, it was not bound by the full gamut of sentencing provisions in our penal code. Although N.J.S.A. 2C:1-4 c provides that the Code's degree classification scheme applies to non-Code offenses, it is clear that the Legislature never intended the Code to apply a court's contempt power. Thus, N.J.S.A. 2C:1-5 c, which addresses the general applicability of the Code provisions, states that:

> This section does not affect the power to punish for contempt, either

> summarily or after indictment, or to employ any sanction authorized by law for the enforcement of an order or a civil judgment or decree.

As explained in the commentary to N.J.S.A. 2C:1-5 c in II Final Report of the New Jersey Criminal Law Revision Commission (Oct. 1971) at 12:

> Paragraph c makes it clear that it is not a purpose of the Code to deal with the judicial power to punish for contempt or to use sanctions to enforce an order or a civil judgment or decree, even though imprisonment may be employed. Cf. In re Buehrer, supra.

The cases upon which defendant relies in arguing that the Code provisions apply in the instant case, State v. Sobel, 183 N.J.Super. 473 (App.Div.1982) and State v.

Dachielle, 195 N.J.Super. 40 (Law Div.1984), both involved offenses under Title 24, the Controlled Dangerous Substances Act. As there is direct statutory support for applying the Code provisions to Title 24 offenses, see N.J.S.A. 2C:43-1 b; N.J.S.A. 2C:1-5 b, these cases are distinguishable from the instant controversy. Thus, contrary to what defendant avers, neither the presumption against incarceration nor many of the other Code provisions apply in the instant case.

However, defendant is correct in before passing sentence. In Vasky, supra, we stressed the importance of the sentencing court's examining possible aggravating and mitigating factors, including whether or not an alleged contemnor has a prior criminal record or

history of contumacious conduct. Such an inquiry is especially important when there is uncertainty surrounding a defendant's past. In addition, we held that the trial court should have determined the financial impact that defendant's 15-day sentence would have upon defendant and his family. This consideration may have suggested that the sentence be served on weekends and nights. Because none of these essential findings had been made, we were unable to assess the propriety of the 15-day jail term and, therefore, remanded the matter to the trial court.

Here, the trial court stated in the March 24, 1986 supplemental order that "[t]he conduct of Mr. Daniels in this matter (as confirmed by his comments) and the need to deter him from similar future conduct was so significant that these two

aggravating factors qualitatively outweighed all mitigating factors." The trial court reached this decision even though it assumed that every mitigating factor was applicable to defendant. According to the trial court, a balancing of the aggravating and mitigating factors and the belief that defendant's conduct "created an open threat to the orderly procedure of the Court" warranted the imposition of a custodial sentence.

[18] Defendant's conduct occurred in a pretrial hearing outside the presence of the jury. Although this behavior was properly punishable as contempt, the circumstances suggest that the harm visited upon the judicial system was not too severe. Furthermore, being fined $500 and rebuked in open court undoubtedly impressed upon defendant the seriousness

of his conduct and should deter him from similar acts in the future. Under the circumstances, we are satisfied that imprisonment was not an appropriate punishment for defendant's conduct.

Accordingly, we find defendant guilty beyond a reasonable doubt of the contempt charge and fine him $500. We deem this punishment to be adequate and, thus, vacate the custodial portion of the sentence imposed by the trial court.

SKILLMAN, J.A.D., dissenting.

I agree for the reasons stated in the majority's comprehensive opinion that defendant's alleged contempt was in the presence of the court and thus was subject to summary adjudication by the trial judge pursuant to R. 1:10-1, that the power to proceed pursuant to R. 1:10-1 was not

lost by virtue of the delay in adjudicating the contempt, and that defendant was not entitled to counsel. However, I am unable to agree with the majority's conclusion that defendant's conduct constituted contempt as a matter of law. In my view, there is evidence in the existing record on which a finding of contempt could be sustained, but this evidence is subject to dispute in important respects. Since we are required to conduct a de novo review of the record on appeal from an adjudication of contempt and the existing record is inadequate to enable us to properly perform this responsibility, I would refer the matter to a trial court to conduct an evidentiary hearing and to submit to us recommendings findings of fact and conclusions of law before we decide the

appeal.

The summary contempt power involves a delicate balance between conflicting imperatives of our judicial system. On the one hand, the power is indispensable to "protect the processes of orderly trial." Sacher v. United States, 343 U.S. 1, 14, 72 S.Ct. 451, 457, 96 L.Ed. 717 (1952). On the other hand, the power is capable of abuse for "... the court is at once the complainant, prosecutor, judge and executioner." In re Mattera, 34 N.J. 259, 272 (1961). Therefore, "[i]t is a power which can be justified by necessity alone." Ibid; see generally, Kuhns, "The Summary Contempt Power: A Critique and a New Perspective," 88 Yale L.J. 39 (1978).

A summary contempt proceeding against an attorney for conduct during trial raises especially difficult problems. See

Offut v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954); Sacher v. United States, supra; In re Carton, 48 N.J. 9 (1966). The Third Circuit Court of Appeals has observed that:

> A balance must be maintained, however, between the necessity for judicial power to curb obstruction of justice in the courtroom and the need for lawyers to present their clients' cases fairly, fearlessly, and strenuously. In preserving the balance, a court must not exercise its summary power of contempt to stifle courageous and zealous advocacy and thereby impair the independence of the bar. On the other hand, the dignity, the independence, and the control of the court must not be degraded by lawyers

who "equate contempt with courage.... [T]he processes of orderly trial, which [are] the supreme object of the lawyer's calling," must be protected. Sacher v. United States, 343 U.S. 1, 14, 72 S.Ct. 451, 457, 96 L.Ed. 717 (1952). [Commonwealth of Pennsylvania v. Local 542, supra, 552 F.2d 498, 503 (3rd Cir.1977), cert. den. 434 U.S. 822, 98 S.Ct. 67, 54 L.Ed.2d 79 (1977].)

To preserve the authority of the courts to conduct their proceedings in an orderly manner and at the same time to avoid abuses of the summary contempt power, substantive and procedural limitations have been imposed upon its exercise. Substantively, to constitute contempt an act "... must be accompanied by a mens rea, a willfulness, an

indifference to the court's command." New Jersey Dept. of Health v. Roselle, 34 N.J. 331, 337 (1961); In re Mattera, supra, 34 N.J. at 273. Furthermore, the act must be more than a minor breach of proper courtroom decorum. See In re McConnell, 370 U.S. 230, 82 S.Ct. 1288, 8 L.Ed.2d 434 (1962). Rather, because "[t]he sole credible basis for the summary contempt process is necessity, a need that the assigned role of the judiciary be not frustrated," In re Fair Lawn Education Ass'n, 63 N.J. 112, 114-15 (1973), cert. den., 414 U.S. 855, 94 S.Ct. 155, 38 L.Ed.2d 104 (1973), this power may be invoked only when the interference or threat of interference with the judicial process is imminent. Eaton v. City of Tulsa, 415 U.S. 697, 94 S.Ct. 1228, 39 L.Ed.2d 693 (1974).

The majority states that while the contempt power may be invoked in the federal courts only for an act which causes a "material disruption in or obstruction of a matter pending," the power may be invoked in the New Jersey courts for any conduct which "tends to obstruct the course of justice" (at 583-584; emphasis added). Although our courts have described the scope of the summary contempt power in more expansive terms than the federal courts, see, e.g., In re Caruba, 139 N.J.Eq. 404, 410-11 (Ch. 1947), aff'd 140 N.J.Eq. 563 (E. & A. 1947), cert. den. 335 U.S. 846, 69 S.Ct. 69, 93 L.Ed. 396 (1948), it is important not to overstate the magnitude of the difference between the federal and New Jersey standards for contempt. Our cases state as strongly as the federal cases

that the summary contempt power should be invoked only in circumstances where it is necessary. Compare Taylor v. Hayes, 418 U.S. 488, 496-500, 94 S.Ct. 2697, 2702-2704, 41 L.Ed.2d 897 (1974) and Harris v. United States, 382 U.S. 162, 167, 86 S.Ct. 352, 355, 15 L.Ed.2d 240 (1965) with In re Yengo, 84 N.J. 111, 122 (1980), cert. den., 449 U.S. 1124, 101 S.Ct. 941, 67 L.Ed.2d 110 (1981); and In re Mattera, supra, 34 N.J. at 272. Furthermore, there are federal constitutional limitations upon a state court's exercise the summary contempt power. See, e.g., Eaton v. Tulsa, supra; Mayberry v. Pennsylvania, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971); Holt v. Virginia, 381 U.S. 131, 85 S.Ct. 1375, 14 L.Ed.2d 290 (1965); In re Little, 404 U.S. 553, 92 S.Ct. 659, 30 L.Ed.2d 708 (1972). For a party's conduct

to be punishable as contempt, it "... must constitute an imminent, not merely a likely, threat to the administration of justice." Eaton v. Tulsa, supra, 415 U.S. at 698, 94 S.Ct. 1229, quoting Craig v. Harney, 331 U.S. 367, 376, 67 S.Ct. 1249, 1255, 91 L.Ed.2d 1546 (1947). Thus, the Court has held that due process was denied by state courts summarily adjudicating contempts on the basis in Eaton v. Tulsa of a party referring to another party in open court as "chicken shit" and in In re Little a pro se defendant asserting in his summation that the trial judge "was biased and had prejudged the case and that [defendant] was a political prisoner." Therefore, while I agree with the majority's conclusion that conduct in our courts which has a "tendency to" obstruct the administration of justice may be

contempt, I would conclude that the tendency must be immediate and direct before the "necessity" for invocation of the contempt power can arise.

The procedural safeguards imposed upon the exercise of the contempt power include the presumption of innocence, the privilege against self-incrimination, the right of cross-examination, the admissibility of evidence in accordance with the rules of evidence and the requirement of proof beyond a reasonable doubt. In re Yengo, supra, 84 N.J. at 120. Furthermore, except when a contempt occurs in the actual presence of the judge, it must be heard by a judge other than the one allegedly offended. R. 1:190-1, 1:10-2 and 1:10-4, See In re Yengo, supra, 84 N.J. at 121.

The procedural safeguard most

significant to this appeal is that an appellate court is required to make an independent de novo review of a finding of contempt "on the law and on the facts." R. 2:10-4; see In re Yengo, supra, at 127; In re Hinsinger, 180 N.J.Super. 491, 498 (App.Div.1981). We have observed that "[t]his extraordinary review is given doubtless because in the court of first instance the same judicial officer directs the contempt proceeding to be initiated, appoints the prosecutor, tries the facts, imposes the penalty and may also be unconsciously influenced by the circumstance that he presides over the court against which the alleged contempt was aimed." Zimmerman v. Zimmerman, 12 N.J.Super. 61, 69 (App.Div.1950). On another occasion, we observed that "[t]he nature of our review stands 'as a bulwark

against an attenuation of the rights of an accused.'" State v. Vasky, 203 N.J.Super. 91, 100 (App.Div.1985), quoting In re Education Assoc. of Passaic, Inc., 117 N.J.Super. 255, 259 (App.Div.1971), certif. den. 60 N.J. 198 (1972). The unrestrained exercise of this power of de novo review is especially important with respect to a contempt in the presence of the court which has been summarily adjudicated by the offended judge. See In re Yengo, supra, 84 N.J. at 127; see also In re Contempt of Ungar, 160 N.J.Super. 322 (App.Div.1978).

Under the statute which governed appeals of contempts from 1884 to 1948, the trial de novo on appeal would be based upon evidence presented in the appellate court. See Attorney General v. Verdon, 90 N.J.L. 494 (E. & A. 1917); Zimmerman v.

Zimmerman, supra, 12 N.J.Super. 68-69. Such evidence would be obtained "by depositions or in such other way or manner as the court above shall direct." L. 1884, c. 147, § 2. However, this provision was deleted in 1948. L. 1948, c. 333, § 1 and 2. Consequently, the de novo review on an appeal from an adjudication of contempt is now ordinarily based entirely on the trial record. See In re Yengo, supra; Zimmerman v. Zimmerman, supra, 12 N.J.Super. at 69. However, this court's authority to order supplementation of the trial record is implicit in the broad responsibility conferred upon us by R. 2:10-4 to conduct a de novo review of the facts underlying a contempt. As we stated in State v. Zarafu, 35 N.J.Super. 177, 184 (App.Div.1955), involving contempt in the

presence of a municipal court, "it would be improper to proceed to a disposition of the matter on the merits where the accused did not have a full opportunity to present his side of the case at the original proceeding." See also Zimmerman v. Zimmerman, supra, 12 N.J.Super. at 69.

Although this court has the authority to order supplementation of the record on appeal from an adjudication of contempt, it should be emphasized that the trial record is ordinarily sufficient for a de novo review of the facts. In record to contempts outside the presence of the court, R. 1:10-2 and 1:10-4 contemplate proceedings in which most of the procedural formalities of a conventional trial are followed, including notice to the accused, the right to counsel the right to confrontation and the right to

summon witnesses. See In re Carton, supra, 48 N.J. at 21-22; see also In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed.2d 682 (1948). Hence, it is highly unlikely that such a proceeding would produce a record which would be inadequate for de novo review on appeal. In regard to contempts within the presence of the court, R. 1:10-1 authorizes summary proceedings which lack the normal procedural safeguards of a criminal trial. There is no advance notice of the initiation of the proceedings, no right to counsel and often significant limitations on the opportunity to present a defense. See In re Yengo, supra, 84 N.J. at 121; In re Lependorf, 212 N.J.Super. 284, 292-93 (App.Div.1986). Nevertheless, experience shows that the trial record is ordinarily adequate for de novo review of contempts

in the presence of the court, because the alleged contemptuous conduct, as well as any defense to the charge, is usually clear from the trial record. Thus, where an attorney is late arriving in court, See In re Dias, 76 N.J.Super. 337, 340 (App.Div.1962), or fails to appear at all, see In re Yengo, supra, the failure, as well as any excuse offered by the accused, are generally clear from the trial record. Similarly, where a contempt consists of derogatory or insulting language used in open court, this language will appear in the stenographic record. See State v. Gonzalez, 134 N.J.Super. 472 (App.Div.1975), aff'd in part and rev'd in part, 69 N.J. 397 (1975).

The contempt involved in this appeal is unusual in that it does not consist of conduct or language which is unambiguously

set forth on the trial record. Rather, it consists of facial expressions and gestures. I have no doubt that such conduct can be as contemptuous as the spoken word, and that it would be subject to summary adjudication as a contempt in the presence of the court. However, this form of contempt presents some unique problems. First of all, a court must be cognizant of the fact that persons may make facial grimaces and other gestures unwittingly, especially when they are under emotional stress. Therefore, it may be more difficult than in a case involving another form of contempt for a court to determine whether a facial expression or gesture is made willfully with an intention to disrupt or to cause disrespect for the court. Secondly, while language in the courtroom which has been

found contemptuous may be directly reviewed from the stenographic record, an appellate court must rely upon descriptions by observers to determine whether facial expressions and gestures were contemptuous. And since observers may describe an accused's courtroom demeanor differently, an evidentiary hearing may be required to resolve those differences.

I am convinced that the record in this case contains conflicts and ambiguities concerning defendant's conduct and intentions which require supplementation of the record to enable us to discharge our responsibilities of de novo review. I have no doubt that the facts set forth in the trial judge's supplemental order of March 24, 1986 and summarized in the majority's opinion (at

562-564) would constitute contempt. However, the certification of facts contained in the trial judge's supplemental order is disputed in a number of material respects. Thus, the trial judge's certification recites that

> ... on March 19, 1986, Mr. Daniels reacted with expressions exhibiting disrespect, disdain and scorn similar to but more egregious than his conduct of the prior day. While I was placing on the record my findings and holding, Mr. Daniels again laughed, threw himself back into his chair, shook his head and covered his eyes.

This certification also recites that a number of defendant's statements were made "in a disrespectful manner," "with a contemptuous voice" and "sarcastically."

On the other hand, the clerk of the trial curt has submitted an affidavit, which has been made part of the appellate record,[1]

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1 We granted defendant's motion to supplement the record with his affidavit and that of the clerk. We also granted a motion by the State to supplement the record with an affidavit of the assistant prosecutor who handled the underlying criminal case in which the alleged contempt occurred. The better practice would have been for these affidavits to have been presented to the trial court in connection with a motion to reconsider the order of contempt. However, the summary nature of the proceedings under R. 1:10-1 requires that a liberal approach be taken to any motion to supplement the record on appeal.

which states in pertinent part:

4. After hearing argument from both counsel, the Court began to render its decision. At that time, I was not looking at Mr. Daniels and therefore did not see Mr. Daniels make any gestures. I was, however, seated only a few feet from Mr. Daniels. Prior to being held in contempt, I did not hear Mr. Daniels say a word or utter any sound.

5. After being held in contempt, the Court gave Mr. Daniels an opportunity to be heard. When Mr. Daniels addressed the Court, he vigorously defended his position.

Mr. Daniels aggressively stated his

> opinion. He was not sarcastic or disrespectful in his manner or tone of voice.

In addition, defendant expressly denied on the record that he had made any disrespectful gestures.

Several of defendant's statements quoted by the majority unquestionably exhibit a confrontational approach towards the trial judge. However, apart from the disputed facial expressions and gestures, these statements would not constitute "an imminent ... threat to the administration of justice." Eaton v. Tulsa, supra, 415 U.S. at 698, 94 S.Ct. at 1229. Nor could it be concluded that these statements were made willfully with "... an indifference to the court's command.." New Jersey

Dept. of Health v. Roselle, 34 N.J. 337. Therefore, the undisputed parts of the trial record do not establish that defendant committed a contempt of court. See In re Little, supra; State v. Jones, 105 N.J.Super. 493 (Law Div.1969).

There is an understandable reluctance to order an evidentiary hearing in which the trial judge may need to be called as a witness. However, where a trial judge's certification of facts differs in material respects from other evidence in the record, such a hearing is mandated. See State v. Jones, supra. Our responsibility to conduct a de novo review of the facts on an appeal from an adjudication of contempt precludes us from simply accepting a trial judge's certification

and rejecting conflicting evidence without a hearing.

Where a trial record is not adequate for a complete and fair review of an adjudication of contempt, it is appropriate under some circumstances to remand the matter to the trial judge. See, e.g., State v. Zoppi, 72 N.J.Super. 432, 437 (App.Div.1962); State v. Zarafu, supra. However, this would not be an appropriate disposition under the circumstances of the present case because the trial judge may need to be called as a witness at the hearing.[2] Furthermore, as I view this case, what is now required is

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2 A remand to the trial judge would not be possible in any event because he is no longer on the state bench.

not a rehearing of the contempt a the trial level pursuant to R. 1:10-2 and 1:10-4, but rather a hearing to develop a complete record for de novo appellate review of a contempt properly adjudicated pursuant to R. 1:10-1. In this procedural posture, the most appropriate disposition is to retain jurisdiction and to refer the matter to an appropriate trial curt to hear the evidence and to submit to us recommended findings of fact and conclusions of law.

Accordingly, I dissent from the judgment adjudicating defendant guilty of contempt based on the existing record.

S. DAVID LEVY
Deputy Public Defender
Office of the Public Defender
Union Region
125 Broad Street
Elizabeth, New Jersey 07201
(201) 820-3070

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3243-85T5
SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-UNION COUNTY
CRIMINAL
Dated Mar. 19, 1986

THE MATTER OF :
:
ORDER
JAMES B. DANIELS, ESQ. :

This matter having been opened to the Court by James B. Kervick, Assistant Deputy Public Defender, in the presence of , Assistant Prosecutor, and the Court having considered the papers and having heard the arguments of counsel:

It is on this 19th day of March, 1986, ORDERED that James B. Daniels, Assistant Deputy Public Defender, be sentenced for contempt of court, pursuant to R. 1:10-1 to a period of two days in the Union County Jail and $500.00 fine.

s/ Alfred J. Lechner, Jr.
ALFRED J. LECHNER, JR., J.S.C.

ORDER ON
MOTIONS/PETITIONS
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3243-85T5
MOTION NO.
BEFORE PART D
BEFORE JUDGES MICHELS
GAULKIN
DEIGHAN
Date Mar 19 1986

FILED WITH THE COURT

IN THE MATTER OF
JAMES B. DANIELS, ESQ.

---

s/ Herman D. Michels
HERMAN D. MICHELS, P.J.A.D.

MOVING PAPERS FILED MARCH 19, 1986
ANSWERING PAPERS FILED
DATE SUBMITTED TO COURT MARCH 19, 1986
DATE ARGUED
DATE DECIDED MARCH 19, 1986
ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS

HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
MOTION/XXXXXXXXX FOR TEMPORARY EMERGENT RELIEF	X		X

SUPPLEMENTAL:

The Order of the Law Division sentencing defendant James B. Daniels, Assistant Deputy Public Defender, for contempt of court to two days in the Union County Jail and fining him $500, dated March 19, 1986, is stayed pending appeal. Defendant James B. Daniels, Esq., shall be released on his own recognizance.

The court on its own motion hereby accelerates the appeal and directs that the Clerk of the Appellate Division to prepare an accelerated briefing schedule and set the matter down for argument or submission as soon as practicable.

FOR THE COURT:

s/ Herman D. Michels
HERMAN D. MICHELS,
P.J.A.D.

WITNESS, THE HONORABLE HERMAN D. MICHELS, PRESIDING JUDGE OF PART D, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 19TH DAY OF MARCH, 1986.

s/ Elizabeth McLaughlin
CLERK OF THE APPELLATE
DIVISION

PREPARED BY THE COURT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-32 3-85T5

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - UNION COUNTY
Dated March 24, 1986

Contempt

IN THE MATTER OF :
JAMES B. DANIELS, ESQ. :

ORDER OF CONTEMPT

This matter having occurred in open Court in the presence of James B. Daniels, Assistant Deputy Public Defender and in the presence of Thomas Simon, Assistant Prosecutor, and for good cause shown:

It is on this 24th day of March, 1986

ORDERED that James B. Daniels, Assistant Deputy Public Defender, be sentenced for Contempt of Court for a period of two days to the Union County

Jail and a fine of $500.00.

On March 19, 1986 the Office of the Public Defender presented an order for signature, attached as Exhibit A, and requested it be signed to permit the filing of an immediate appeal with the Appellate Division. Douglas T. Kabak, an attorney with the Office of the Public Defender, who presented the form of order for signature, was informed that the order should contain information as required pursuant to Rule 1:10-1. Since neither secretarial assistance was available nor was there time to supplement the order, the order was signed, as then presented, to permit the immediate appeal.

This order is entered in compliance with Rule 1:10-1 and is meant to supplement the Order signed on March 19, 1986.

The facts upon which this contempt in the presence of the Court has been adjudicated are as follows:

1. Hearings were held on March 18, 1986 in the matter entitled State v. McMahon, Indictment No.: 1502-11-85. During these hearings on March 18, 1986, which were outside the presence of a jury, James B. Daniels was cautioned that his conduct was offensive (See excerpts of proceedings page 2 line 14-22.) and disruptive to the orderly proceedings of the Court.

2. The conduct of Mr. Daniels on March 18, 1986 consisted of various expressions of disrespect during the rendering of an opinion, including shaking his head, laughing, and rolling his eyes and head to express his disapproval and scorn. (page 2 line 14--16). Mr. Daniels

was explicitly warned not to repeat the conduct (page 2 line 18--24).

3. Mr. Daniels was warned in detail that should he repeat his conduct he would be found in contempt of court and placed in the County Jail. He was warned this was not a possibility but a certain reaction to a repeat of his conduct. (page 2 line 18--22).

4. Mr. Daniels was asked on March 18, 1986 as to whether he understood the warning. He sarcastically responded that "[y]ou [the court] could not be clearer." (page 3 line 1--3).

5. On March 18, 1986, before he was warned and a description of his conduct was placed on the record, Mr. Daniels was apprised of my concern for his actions and was informed that "appropriate actions" would be taken in a response to a repeat

of his conduct. (page 2 line 8--10). In response to this, Mr. Daniels stated "[y]our Honor, go right ahead, take whatever appropriate actions your Honor deems necessary." (page 2 line 11-13). This was a statement which by its terms, inflection of voice and sarcastic manner of delivery verbally confirmed the disrespect of Mr. Daniels evidenced just a few moments earlier.

6. Although it would have been justified, no reaction was made to the dare of Mr. Daniels to take whatever appropriate actions I deemed were necessary. In fact, an effort was made to defuse the situation.

7. Following a recess to handle another matter, Mr. Daniels recognized the seriousness of his conduct and apologized for his conduct. (page 3 line 11--15). I

then indicated that we should "put it behind us and forget about it." (page 3 line 16--17).

8. On March 19, 1986 following the completion of selection of the jury but prior to swearing the jury and outside the presence of the jury, Mr. Daniels made a motion pursuant to State v. Gilmore, 199 N.J. Super. 389 (App. Div. 1985), (petition for certification filed.)

9. After hearing arguments of counsel, it was pointed out there are four criteria that would have to be met by the defense attorney, the first being that a timely motion be made. I acknowledged the motion was made before the swearing of the jury, as required, but nevertheless questioned the timeliness of the motion. Before this comment could be explained and before the balance of the findings and

opinion could be stated, Mr. Daniels again reacted with seriously offensive and contemptuous conduct.

10. At this time on March 19, 1986, Mr. Daniels reacted with expressions exhibiting disrespect, disdain and scorn similar to but more egregious than his conduct on the prior day. While I was placing on the record my findings and holding, Mr. Daniels again laughed, threw himself back into his chair, shook his head and covered his eyes. (page 4 line 17--19).

11. Mr. Daniels was cited for contempt of court (page 4 line 23). Although I used the term "find" on several occasions (page 4 line 23, page 6 line 2, page 6 line 4, 5 and 15), the use of this term on the first two occasions (page 4 line 23, page 6 line 2) was in effect a

notification or charge of contempt of court. Mr. Daniels was not held in contempt of court until after he was given an opportunity to be heard with regard to his mens rea and sentencing. (page 4 line 24; page 5 line 20--23; page 6 line 3).

12. Mr. Daniels interrupted my comments and denied on the record that he did any of the things described in paragraph 10. He then stated "[a]nd I'm tired of this kind of stuff." (page 4 line 22). This comment by Mr. Daniels was made in a disrespectful voice.

13. At this time, Mr. Daniels was asked as to whether he wished to respond (page 4 line 24). It was indicated that Mr. Daniels would be afforded "an opportunity to show [he] did not possess at the time the requisite mens rea but this will be done at the summary hearing

immediately." (page 5 line 20--23).

14. I also noted Mr. Daniels had been previously warned about his conduct in court. (page 5 line 24--page 6 line 2). As I mentioned this, Mr. Daniels again began to laugh and demonstrate his disrespect; this was noted on the record. (page 6 line 4).

15. Thereafter Mr. Daniels entered into what can only be described as a tirade (page 6 line 5--page 8 line 17). At a point during his comments, it was necessary to direct him to lower his voice which he acknowledged and for which he apologized. (page 7 line 16--18). However, in the next breath, Mr. Daniels stated "I'm trying to show the most respect that I can for <u>this</u> court." (page 7 line 18--19) (emphasis as stated). This comment, by the inflection of his voice,

was made in a disrespectful manner. It was calculated to be offensive and was offensive.

16. During the comments by Mr. Daniels, he accused the Court of being "a second prosecutor." (page 6 line 10--13). Again, this was done with a contemptuous voice.

17. Mr. Daniels sought to explain his conduct by indiating that he was "human." (page 6 line 6--7, line 23). Although Mr. Daniels was afforded an opportunity to demonstrate he did not have the requisite mens rea, his explanations were unavailing. In point of fact, he admitted doing what he previously denied happened. (page 6 line 23 to page 7 line 1).

18. Mr. Daniels stated "I think that if we put anybody in this courtroom right

now [on the stand] that they would testify that I did nothing that was disrespectful to the Court." (page 7 line 2--4).

19. After Mr. Daniels completed his comments, he was asked whether he wished to say anything further. He was also asked whether he wished to call any witnesses. Mr. Daniels' answers to both questions were negative (page 8 line 15--page 9 line 13). No one in the courtroom could support the contentions made by Mr. Daniels; this was obvious when he declined the opportunity to call witnesses.

20. The conduct of Mr. Daniels was willful, deliberate and disruptive to the proceedings of the Court and committed in my presence.

21. I find that Mr. Daniels willfully disregarded the warning and direction of this court and was willfully

contemptuous. This is especially so in light of his comment on March 18, 1986, as set forth in paragraphs 4 and 5. Moreover, even after citing him for contempt and demonstrating on the record on March 19, 1986 that his conduct was contemptuous, and before giving him the opportunity to be heard with regard to sentencing or demonstration that he did not possess the mens rea, I found that he was continuing to laugh and demonstrate disrespect and disdain. (page 6 line 4). In addition, his comments addressed to the court on March 19, 1986 were calculated to and had the effect of lessening the dignity of the court. This was made plain when Mr. Daniels sarcastically stated "I am trying to show the most respect I can for this Court." (page 7 line 18--19) (emphasis as stated).

22. Because of the conduct demonstrated by and comments by Mr. Daniels on March 19, 1986, as aforesaid, and especially in light of the warning given and his conduct on March 18, 1986, I found this conduct (as confirmed by his comments) created an open threat to the orderly procedure of the Court. Such conduct required that it be instantly suppressed and punished. Imposition of a custodial sentence was required.

23. Although at the time of sentencing of Mr. Daniels for this contempt of court it was not stated on the record, I found that the aggravating factors outweighed the mitigating factors (N.J.S.A. 2C:44-1). The conduct of Mr. Daniels in this matter (as confirmed by his comments) and the need to deter him from similar future conduct was so

significant that these two aggravating factors qualitatively outweighed all mitigating factors. Although Mr. Daniels did not address his comments to sentencing, I assumed he had no prior record and further assumed that the other mitigating factors would be applicable to him. Nevertheless, it was a balancing of the quality of factors which required the imposition of incarceration.

24. Shortly after the completion of the proceedings as described above, a representative of the Office of the Public Defender came to see me in chambers on behalf of Mr. Daniels. He asked as to whether I would be willing to vacate the sentence of two days in the County Jail if Mr. Daniels apologized. I responded and stated I would in fact vacate the imposition of the jail sentence and, even

though not asked to do so, I would also reduce the fine, if Mr. Daniels apologized. The representative indicated he was glad to know that and stated he would immediately speak with Mr. Daniels. A short time later, I received a telephone call from this person and was informed Mr. Daniels was not interested in apologizing. About forty-five minutes later a second representative of the Office of the Public Defender came to see me. The same conversation was repeated with the same result--Mr. Daniels was not interested in apologizing.

25. This will certify I saw and heard the conduct constituting the contempt referred to herein and as cited to the transcript of proceedings attached as Exhibit B and incorporated herein by reference.

s/ Hon. Alfred J. Lechner, Jr.
HON. ALFRED J. LECHNER, JR.

A-3243-85T5 ORDER ON MOTIONS/PETITIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3243-85T5
MOTION NO. M-3458-85
BEFORE PART E
JUDGE BILDER

Dated May 8, 1986

IN THE MATTER OF
JAMES B. DANIELS, ESQUIRE.

MOVING PAPERS FILED APRIL 16, 1986
ANSWERING PAPERS FILED APRIL 24, 1986
DATE SUBMITTED TO COURT MAY 5, 1986
DATE ARGUED
DATE DECIDED MAY 8, 1986

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS

HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
MOTION/XXXXXXXXX FOR LEAVE TO APPEAL AS AMICUS CURIAE AND TO PARTICIPATE IN ORAL ARGUMENT	X	X	X

SUPPLEMENTAL:

LEAVE TO FILE A BRIEF IS GRANTED.

LEAVE TO PARTICIPATE IN ORAL ARGUMENT IS DENIED.

THE BRIEF SHALL BE LIMITED TO THE ISSUE SET FORTH IN THE AFFIDAVIT -- THE CHILLING EFFECT THAT MISUSE AND/OR PRECIPITOUS USE OF THE SUMMARY CONTEMPT POWER CAN HAVE ON ATTORNEY'S VIGOROUS REPRESENTATION OF HIS OR HER CLIENT.

FOR THE COURT:

s/ Lawrence Bilder
LAWRENCE BILDER, P.J.A.D.

WITNESS, THE HONORABLE LAWRENCE BILDER, XXXXXXXXX JUDGE OF PART E, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 8TH DAY OF MAY 1986.

s/ Elizabeth McLaughlin
CLERK OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3243-85T5
Dated May 2, 1986

NOTICE OF MOTION

IN THE MATTER OF :
JAMES B. DANIELS, ESQ. :

TO: Richard W. Berg, D.A.G.
Office of the Attorney General
Hughes Justice Complex
Trenton, New Jersey 08625

PLEASE TAKE NOTICE that appellant James Daniels, by his attorneys, hereby moves before the Superior Court of New Jersey, Appellate Division for an order pursuant to R. 2:5-5 to supplement the record in this matter.

Appellant will rely upon the brief and appendix submitted herewith in support of this motion.

Alfred A. Slocum
Public Advocate
Dept. of the Public Advocate
Richard J. Hughes Justice
Complex
CN 850

Trenton, New Jersey 08625
(609) 292-1889
Attorneys for Appellant

By: s/ Louis S. Raveson
Louis S. Raveson
Assistant Commissioner

Dated: May 2, 1986

ORDER ON
MOTIONS/PETITIONS

A-3243-85T5
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3243-85T5
MOTION NO. M-3728-85(s)
BEFORE PART E
JUDGE BILDER

Dated June 2, 1986

IN THE MATTER OF JAMES B. DANIELS, ESQUIRE

MOVING PAPERS FILED	May 2, 1986
ANSWERING PAPERS FILED	May 14, 1986
DATE SUBMITTED TO COURT	May 19, 1986
DATE ARGUED	
DATE DECIDED	June 2, 1986

SUPPLEMENTAL ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS

HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
MOTION/XXXXXXXXX TO SUPPLEMENT THE RECORD	X		X

SUPPLEMENTAL:

In clarification of my earlier order, leave is granted to supplement the record with affidavits but insofar as the motion seeks a remand for the taking of testimony, the motion is denied.

FOR THE COURT:

s/ Lawrence Bilder
LAWRENCE BILDER, J.A.D.

WITNESS, THE HONORABLE LAWRENCE BILDER, XXXXXXXXX JUDGE OF PART E, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 2ND DAY OF JUNE 1986.

s/ Elizabeth McLaughlin
CLERK OF THE APPELLATE DIVISION

S. DAVID LEVY
Deputy Public Defender
Office of the Public Defender
Union Region
125 Broad Street
Elizabeth, New Jersey 07201
(201) 820-3070

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-UNION COUNTY

DOCKET NO. A-3423-85-T5

Dated April 29, 1989

IN THE MATTER OF :
:
JAMES B. DANIELS, ESQ. :

A F F I D A V I T

STATE OF NEW JERSEY:
: SS.
COUNTY OF UNION :

I, JAMES B. DANIELS, of full age, having been duly sworn upon my oath according to law, depose and say:

1. I am an Assistant Deputy Public

Defender employed by the Union County Trial Region of the Office of the Public Defender.

2. On March 19, 1986, in the course of selecting a jury in State v. McMahan, Indictment No. 1502-11-85, the Honorable Alfred J. Lechner, Jr. held me in contempt of court for visibily displaying my displeasure with the Court's ruling on my motion for a mistrial made pursuant to State v. Gilmore, 199 N.J. Super. 385 (App. Div. 1985).

3. At the time of this incident Assistant Prosecutor Thomas P. Simon represented the State and Ms. Judy Kollarik was the official court reporter assigned to Judge Lechner's court. Both Mr. Simon and Ms. Kollarik were present in court during the contempt proceedings.

4. Subsequent to the above incident

I spoke with both Assistant Prosecutor Simon and Ms. Kollarik.

5. Assistant Prosecutor Simon stated that during the course of the court rendering its decision on my Gilmore application he looked up at the bench and observed Judge Lechner glaring in my direction. As he turned to look at me, he observed me sitting back in my chair, shaking my head disapprovingly with a smile or grin on my face. Mr. Simon further stated that prior to being held in contempt he did not hear me say a word or utter a sound. When given an opportunity to address the court, Mr. Simon stated that I vigorously defended my position as he had heard many attorneys argue and defend their respective positions in the past.

6. Ms. Kollarik, in discussing this

incident with me, stated the following: As the Court began to rule against me on the Gilmore application, she, too, observed me lean back in my chair, put my hand to my forehead and shake my head in disagreement with the Court. At that time I was grinning or smiling. Although seated only a few feet from me, she did not hear me say a word or make a sound. Moreover, she stated that had I said anything, made any sound or laughed audibly in the courtroom, those remarks would have been recorded and incorporated into the transcript she prepared for this appeal.

7. The above facts are true to the best of my knowledge.

s/ James B. Daniels
JAMES B. DANIELS, ESQ.

Sworn and subscribed to before
me this 1st day of May, 1986.

s/ Frank R. Krack
ATTORNEY-AT-LAW, STATE OF NEW JERSEY

S. DAVID LEVY
Deputy Public Defender
Office of the Public Defender
Union Region
125 Broad Street
Elizabeth, New Jersey 07201
(201) 820-3070

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-UNION COUNTY
CRIMINAL

DOCKET NO. A-3423-85-T5

Dated April 29, 1986

IN THE MATTER OF :
:
JAMES L. DANIELS :

A F F I D A V I T

STATE OF NEW JERSEY:
: SS.
COUNTY OF UNION :

I, James Tighe, of full age, being duly sworn upon my oath, depose and say:

1. I am a Court Clerk employed by Union County. On Wednesday, March 18, 1986, I was assigned to the courtroom of

the Honorable Alfred J. Lechner, Jr.

2. On March 18, 1986 the matter of State v. Michael McMahan, Indictment No. 1502-11-85 was being tried. Assistant Prosecutor Thomas P. Simon represented the State. Assistant Deputy Public Defender James B. Daniels represented the defendant.

3. After handling some pretrial matters, jury selection began the morning of March 18, 1986 and continued after the luncheon recess. After both the prosecutor and defense counsel stated that the jury was satisfactory, the Court excused the jury and sent them into the jury room. At that time, Mr. Daniels moved for a mistrial arguing that the State had improperly excused all black women from the jury.

4. After hearing arguments from both

counsel, the Court began to render its decision. At that time, I was not looking at Mr. Daniels and therefore did not see Mr. Daniels make any gestures. I was, however, seated only a few feet from Mr. Daniels. Prior to being held in contempt, I did not hear Mr. Daniels say a word or utter any sound.

5. After being held in contempt, the Court gave Mr. Daniels an opportunity to be heard. When Mr. Daniels addressed the Court, he vigorously defended his position.

Mr. Daniels aggressively stated his opinion. He was not sarcastic or disrespectful in his manner or tone of voice.

6. The above is true to the best of my knowledge.

s/ James Tighe
JAMES TIGHE

Sworn and subscribed to before
me this 29th day of April, 1986.

s/ James B. Daniels
ATTORNEY-AT-LAW, STATE OF NEW JERSEY

SUPREME COURT OF THE UNITED STATES

No. A-804

James B. Daniels,

Petitioner

v.

Superior Court of New Jersey, Appellate Division

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including 6/18/90, 1990.

s/ Wm. J. Brennan
Associate Justice of the

Supreme Court of the United States

Dated this 14
day of May, 1990.